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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 37.

THE COVINGTON AND CINCINNATI BRIDGE COMPANY, PLAINTIFF IN ERROR,

vs.

S. W. HAGER, AUDITOR OF PUBLIC ACCOUNTS OF THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

FILED JUNE 7, 1905.

(19,790.)

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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a COVINGTON & CINCINNATI BRIDGE COMPANY, Plaintiff in Error,

vs.

S. W. HAGER, Auditor of Public Accounts of the Commonwealth of Kentucky, Defendant in Error.

Transcript of the Record.

S. D. Rouse, Covington, Kentucky, For Plaintiff in Error.
N. B. Hays, Attorney General for Kentucky, Frankfort Kentucky, For Defendant in Error.

1 THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, set:

Record of the proceedings of the Circuit Court of the United States within and for the Eastern District of Kentucky, sitting at Frankfort, in the cause and matter hereinafter stated, and the same being disposed of at a regular term of said court begun and held at the said city of Frankfort, in said district, on Monday, the 13th day of March A. D. 1905 and of the Independence of the United States the 129th year.

Present: The Honorable A. M. J. Cochran, United States District Judge.

No. 462. At Law.

THE COVINGTON & CINCINNATI BRIDGE COMPANY

vs.

S. W. HAGER, Auditor of Public Accounts of the Commonwealth of Kentucky.

Said action was commenced on the 24th day of August, A. D. 1904, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

On the 24th day of August A. D. 1904 the plaintiff, The Covington & Cincinnati Bridge Company, filed in the clerk's office of the said court its petition at law, which is as follows:

2 *Petition.*

United States Circuit Court for the Eastern District of Kentucky, at Frankfort.

THE COVINGTON AND CINCINNATI BRIDGE COMPANY, Plaintiff,
vs.
S. W. HAGER, Auditor of Public Accounts of the Commonwealth of Kentucky, Defendant.

The plaintiff, The Covington and Cincinnati Bridge Company, says it is a corporation created by an Act of the General Assembly of the Commonwealth of Kentucky, approved upon the 17th day of February 1846 entitled "An Act Incorporating The Covington and Cincinnati Bridge Company, and by an Act of the General Assembly of the State of Ohio approved March 26th 1849, the said Company was made a body politic and corporate of the State of Ohio, "with the same franchises, rights and privileges, and subject to the same duties and liabilities" as were specified in the Charter granted by the State of Kentucky, and it was further provided by the Act of the State of Ohio "that nothing herein contained shall be construed to take away the jurisdiction of this State to the center of said Bridge, nor in any wise to acknowledge the jurisdiction of this Commonwealth of Kentucky this side of said center.

The Act of the State of Ohio was amended by an Act approved March 20th 1850, granting said Bridge Company the power to condemn land in the State of Ohio, necessary for its approaches, abutments and passages. The original Act of the General Assembly of the Commonwealth of Kentucky, granting a Charter to
3 the plaintiff was amended by an Act of the General Assembly of the Commonwealth of Kentucky approved February 6th 1858, giving said plaintiff the power to condemn land in Kentucky necessary for the location, erection or convenience of the bridge toll house, abutments, piers, anchor pits, or approaches to same.

Under the Charter granted by the State of Kentucky, said Company was given the right to fix the rate of toll for pasing over said Bridge, and to collect the same from all and every person, or persons, passing thereon, with their goods, carriages or animals of every description or kind. Copies of the Acts of the States of Kentucky and Ohio, chartering said plaintiff and the amendments thereto made are filed herewith as part hereof marked "A."

By an Act of Congress approved February 17th 1865 said complainant was declared to be, when completed in accordance with the laws of the States of Ohio and Kentucky, a post road for the conveyance of the mails of the United States.

Plaintiff says it maintains and office in the State of Kentucky, and its principle place of business is in said State, and that it is a citizen of Kentucky, and also a citizen of Ohio. It says that in accordance with the powers granted it by the various acts of legisla-

tion above set out, it erected a bridge structure over the Ohio River between the States of Kentucky and Ohio, the South end of said bridge being in the State of Kentucky and the north end in the State of Ohio, and it says it opened said bridge for traffic upon the 1st day of January 1867, and that it has ever since, at the dates herein set out and now maintains said bridge for the passage
4 of persons, with their animals and vehicles, engaged in all kinds of business, between the states of Ohio and Kentucky, and that is charges according to a scale of fixed charges, toll from each person, walking driving or riding over said bridge, and that it charges tolls for each horse or other animal going over or across said bridge, and for each carriage, buggy, wagon, or vehicle of whatsoever kind drawn by whatever means across or over said bridge.

It says it is engaged in no other business than as set out, and its bridge is not a railway bridge, and it has no other income but that derived from the business above set out, excepting $..... which it annually collects as rental for real estate situated at the end of said bridge in the State of Ohio, and which real estate it was obliged to acquire in order to procure a suitable terminal for its bridge on the Ohio side of said Ohio river.

It says that the amount in controversy herein exceeds $2000, exclusive of interest and costs.

It says the defendant, S. W. Hager, is Auditor of Public Accounts of the Commonwealth of Kentucky and is a citizen of Kentucky, and his residence is at Frankfort in the Eastern District of Kentucky.

It says that upon —th day of September 1902, as of date the 15th of said month, in pursuance to the provisions of section 4078, Kentucky Statutes, it filed with the Auditor of Public Accounts of the Commonwealth of Kentucky, in the form prescribed by the Auditor a statement, verified by its President, showing the name and prin*ci*ple place of business of plaintiff; the kind of business engaged in; the amount of its capital stock preferred and common; the number of shares of each; the amount of stock paid up; the par and
5 real value thereof; the highest price at which said stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year 1902; the amount of surplus fund and undivided profits and the value of all other assets; the total amount of indebtedness as principal, the amount of gross and net earnings or income, including interest on investments and the incomes from all other sources for twelve months next preceding the 15th day of September 1902; the amount and kind of tangible property in this state, and where situated, assessed or liable to assessment in this state, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and also in accordance with section 4079 Kentucky Statutes showing the gross and net income or earnings received in this state, and in the State of Ohio, and the entire gross receipts of plaintiff in this State and in the State of Ohio during the twelve months next before the 15th day of September 1902, as of which date said assessment was required to be made—A copy of said statement is filed herewith as part hereof marked "B." And thereupon the plaintiff says the Board of Valuation and Assess-

ment, consisting of the Auditor of Public Accounts, Treasurer and Secretary of State of the Commonwealth of Kentucky constituted by section 4077, Kentucky Statutes, pretending to act in accordance with sections 4079 and 4080 Kentucky Statutes, for the purpose of assessing the franchise of said complainant for taxation by the Commonwealth of Kentucky and by the County of Kenton in which County the Kentucky end of said bridge is located, took the sum total of the net income of said bridge to-wit, $12,151.07, which was the net income from the Kentucky end of said Bridge and $23,519.35, which was the net income from the Ohio end of said Bridge which said income included an item of $2,240 derived from the rent
6 from real estate owned by said complainant at the Ohio end of said bridge in the State of Ohio, for the year ending September 15th 1902, making a total of $35,670 to this they added the interest paid upon the bonds of the complainant outstanding, or $22,000, and the dividends paid upon the stock, or $29,814, and the expense named in the report as "Enlargement" which was in fact attorneys fees, or $584, making in all $88,068, and this sum they capitalized upon a six per centum basis, making the entire value of the Bridge Company's property, so estimated $1,467,800—of this value they took fifty-nine per centum, which is the proportion which that portion of the Bridge structure lying in the State of Kentucky bears to the entire Bridge structure, or $866,002 which said Board claimed to be the valuation of that portion of plaintiff's property, tangible and intangible within the Commonwealth of Kentucky—from this valuation said Board deducted the valuation of the tangible property of the plaintiff company which for the year named was assessed at $400,000, leaving the valuation of the franchise of said complainant for State and County purposes in the State of Kentucky at $466,002 upon which the State of Kentucky claimed the right to collect taxes, to-wit, at the rate of fifty cents on the $100 valuation or the sum of $2,330.01.

Plaintiff says that after said Board had fixed the assessment upon its said franchise as aforesaid, it was notified of such fact by the Auditor as by section 4083 Kentucky Statutes was required, and it by its representative appeared before said Board and represented and
7 reported to said Board, and said representations were true, the income received by it in Kentucky from carrying on its business of operating a toll bridge, and in Ohio from carrying on its said business, the operating expenses incurred by it in each state—that its tangible property within the State of Ohio was assessed in the year 1902 for taxation for 1903 at $206,084 upon which the taxes amounted to $4,129.34 which it had paid and its franchise for said year was assessed at $500,000 upon which the taxes levied were $307.72, which it had paid and for said year its tangible property in Kentucky was assessed at $402,000 and it had paid the taxes levied for said State and the County of Kenton on said assessment amounting to approximately the sum of $4,157, and in addition thereto it had paid its taxes for said year to the City of Covington in which City the Kentucky end of said Bridge was located, and it further represented and showed to said Board that the business which it carried

on and in which it was engaged was interstate business only. It says it protested to said Board of Valuation and Assessment against the method of apportioning the valuations of its said property in the two states—It protested against the refusal of said Board to take account of and to consider the tangible and franchise assessments in the State of Ohio. It protested against the Board fixing a franchise valuation or levying a tax upon its property at all, claiming that said tax was and is wholly a tax upon interstate commerce. It showed that all of its earnings were derived from interstate commerce, excepting only the rents received from the real estate belonging to it, lying at the end of said bridge in the State of Ohio, which said real estate it was necessary for it to acquire by condemnation, in order to acquire the necessary approaches in the State of Ohio—and showing that the sole and only business of said bridge is the carrying on of interstate commerce.

8 Plaintiff says that notwithstanding its representations and protests said Board of Valuation and Assessment fixed said franchise valuation as aforesaid, and same became final upon the 2nd day of January 1904.

Plaintiff says that if it is liable for any franchise tax to the State of Kentucky, which it denies, that the assessment of said franchise should have been made under sections 4070 and 4080 Kentucky Statutes, by taking such part of the capital stock of complainant, which value was fixed by said Board at $1,467,600, as the gross receipts in the State of Kentucky, for the twelve months before the 15th of Sept. 1902, towit, $58,373 bears to the entire gross receipts, to-wit, $123,042 which proportionate part amounts to $696,345.06, from which the valuation of the tangible property, $402,875 should have been deducted, leaving the valuation of the franchise for assessment within the State of Kentucky at $293,470.06 upon which the tax payable to the State of Kentucky for the year 1903 at the rate of fifty cents on the $100 valuation, which was the rate of State taxation for the year 1903 would have been $1,467.35, which was less by $862.66 than was required to be paid by the State, and plaintiff protesting that it should not be required to pay any franchise tax to the State at all, in order to get said matter adjusted tendered said amount to the State in full of franchise tax for the year 1903, but same was refused.

Plaintiff says the assessment of the franchise of said Bridge Company fixed by said Board of Valuation and Assessment as hereinbefore set out was and is based wholly and solely, with the exception of the rents as above set out, upon the receipts which it derives from the interstate commerce carried on over its said Bridge, and that said assessment and taxation of its franchise is wholly illegal and

9 invalid and an attempt of said Board for and on behalf of the State of Kentucky to put a burden upon and to regulate interstate commerce contrary to and in violation of the Interstate Commerce clause of the Constitution of the United States, to-wit, Subsection 3 of Section 8 of Article 1.

Plaintiff says that the Act of Board of Assessment and Valuation in fixing the assessment of the franchise of plaintiff for taxation in

the State of Kentucky upon the basis of the proportion of said Bridge Structure within the Commonwealth of Kentucky, and not in accordance with the proportion that the gross receipts of the Bridge Company bears to the entire gross receipts of said Company as required by section 4080 Kentucky Statutes is invalid and contrary to law in that by so assessing said franchise, said Board includes in said assessment the franchise value of said Bridge which is derived from and granted by the State of Ohio, and it also includes the rents of its real estate in Ohio, which real estate was acquired under authority of and by virtue of the Charter powers granted complainant by the State of Ohio, and upon which said complainant pays taxes to the State of Ohio, and the assessment of same and the taxation of same by the State of Kentucky is double taxation, a taking of property without due process of law and contrary to and in violation of the Constitution and laws of Kentucky and contrary to and in violation of the Fourteenth Amendment of the Constitution of the United States.

Plaintiff says that after said assessment became final on January 2nd 1904 and plaintiff was so notified by the Auditor of State, as by law required, a copy of which assesment and notice is filed herewith marked "C," and it says that the taxes upon said assessment by section 4091 Kentucky Statutes became due and payable thirty days hereafter, and plaintiff says upon failure to pay same within thirty days from the date said assessment became final and from the date of notice to plaintiff a penalty of ten per centum would have attached, and said taxes would have borne interest at the rate of ten per centum per annum, and in addition thereto, the plaintiff would have been subject to a further penalty of $50 per day, for each and every day that said tax remained unpaid, and to save itself the pains and penalties provided for by the law of Kentucky as provided in section 4091, Kentucky Statutes, plaintiff protesting that the franchise tax claimed by the State of Kentucky was wholly invalid because it was an attempt to regulate interstate commerce, and protesting that even if any assessment of its franchise for taxation was valid, the method adopted by said Board was invalid and illegal because it was contrary to the law of Kentucky, and that taxation upon such an assessment was taking of property without due process of law, and was double taxation, and was contrary to the Fourteenth Amendment of the Constitution of the United States, upon the — day of January 1904 paid under protest the taxes $2,330.01 claimed by the State of Kentucky into the Treasury of the said State and took the Treasurer's receipt therefor, which is filed herewith as part hereof marked "D."

It says that since the date of payment, to-wit, upon the 19th day of July 1904, it applied to the defendant S. W. Hager Auditor of State, for a warrant on the Treasury for the re-payment to it of the taxes which it paid under portest into the Treasury of Kentucky, and the Auditor refused to issue such warrant to it.

Whereof it prays this Honorable Court for a writ of mandamus directed to the defendant S. W. Hager, Auditor of Public Accounts

of the Commonwealth of Kentucky for $2,330.01 for taxes
11 wrongfully collected from plaintiff by the State of Kentucky, or if for any reason the Court should not consider that such is proper, then plaintiff prays that the Court should by writ of mandamus, compel the defendant to issus to it a warrant upon the State Treasurer for $862.66, and finally for its costs herein and for all proper relief.

S. D. ROUSE,
Att'y for Plaintiff.

STATE OF RHODE ISLAND, *County of Washington, sct:*

Bradford Shinkle says he is the President of the plaintiff Company and the statements in the petition contained are true as he verily believes.

BRADFORD SHINKLE.

Subscribed and sworn to before me by Bradford Shinkle this 20th day of August 1904.

[SEAL.] WINSLOW N. YORK,
Notary Public.

My commission expires June 15th, 1905.

Endorsement: Filed, Aug. 24, 1904, W. G. Chapman, U. S. Clerk.

12 Exhibit "A," filed with said petition, is as follows, to-wit:—

Charter, By-Laws and Amendments of the Covington and Cincinnati Bridge Company.

In Force April 1st, 1884.

Officers of the Covington and Cincinnati Bridge Company, year ending January 14th, 1885.

Amos Shinkle, President.
David Sinton, Vice-President.
A. H. Bugher, Secretary.
Jno. A. Johnson, Assistant Secretary.
First National Bank, Covington, Treasurer.
Directors:
David Sinton, A. H. Bugher, M. Hart, of Cincinnati.
H. Hudson, B. Shinkle, J. F. Fisk, of Covington.

Charter and Amendments.

An Act Incorporating the Covington and Cincinnati Bridge Company.

SECTION 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That James Goodloe, George Carlisle, E. Foote,

Robert Buchanan, Thomas M. Minor and William S. Johnson, of Cincinnati, Ohio; James G. Arnold, John S. Finley, John B.
13 Casey, Chas. A. Withers, Herman J. Groesbeck, Frederick G. Gedge, John K. McNickle, George M. Southgate and Mortimer M. Benton of the City of Covington, with their associates, be, and are hereby created, a body politic and corporate, by the name of the Covington and Cincinnati Bridge Company, for the purpose of erecting and constructing a bridge across the Ohio River, between the Cities of Covington and Cincinnati; and they and their associates and successors shall continue and have perpetual succession, and by that name and style are hereby made as capable in law as natural persons, to contract and be contracted with, sue and be sued, plead and be impleaded, answer and be answered, in this commonwealth and elsewhere, in all courts of law or equity; to make, have and use a common seal, and the same to break, alter and amend at pleasure; they shall also have the power to purchase and hold as much real estate as will be necessary for the site of said bridge, or sites for the piers, abutments, toll-houses and suitable avenues leading to said bridge; also to borrow money, not exceeding the capital stock mentioned in this act, but not to have or exercise the privilege of loaning or issuing bills or notes on banking principles; also to ordain and establish such by-laws, ordinances and regulations as shall be necessary for the well-being and gover-ment of the corporation, not contrary to the laws of this Commonwealth, the State of Ohio, nor the United States.

SEC. 2. That the capital stock of said company shall consist of three hundred thousand dollars, divided into three thousand shares of one hundred dollars each, to be subscribed for and sold in the manner hereinafter mentioned.

SEC. 3. That within sixty days after the passage of this act, and the confirmation of the same by the State of Ohio, the per-
14 sons before named, or a majority of them, shall cause a public advertisement to be made of the time and place of opening the books of subscription to the stock of said company, which books shall be kept open, under the direction of said persons, or a majority of them, not less than ten nor more than ninety days. If, however, at the closing of the subscription, it shall be found that a greater number of shares than three thousand have been taken, then, and in that case, the persons before named, or a majority of them, shall proceed to reduce the number of shares in an equitable and just proportion among the subscribers, not reducing any one below five shares; and they shall have the right to demand and receive from every person subscribing for the stock of said company a sum not exceeding ten nor less than one dollar on each share subscribed, at the time of making the subscription and no subscription shall be deemed valid unless payment is made, if required by the condition of the subscription.

SEC. 4. That whenever one thousand shares shall have been subscribed, the said persons, or a majority of them, shall advertise a meeting of the subscribers at Covington, giving at least fifteen days' notice of the time and place of such meeting; and the stockholders

shall thereupon proceed to elect a president and six directors, and those persons mentioned in the first section of this act, who shall not then be shareholders shall also proceed to fix what compensation the said president and directors shall be entitled to receive, if any be allowed; also to ordain and adopt any such by-laws for the permanent organization of the said corporation as they may deem needful—at which meeting each shareholder shall be entitled to one vote for each share to the number of fifteen, and to one vote for
15 every five shares over fifteen to the number of fifty, and to one vote for every ten shares exceeding fifty; and at all subsequent elections or general meetings of the stockholders, no shares shall be voted on that have not stood in the name of the person claiming to vote at least three months previous to the day of election or meeting, and that the shares in said company may be voted on by proxies, duly recorded, conforming to the foregoing regulatios.

SEC. 5. That the president and directors first chosen shall hold their offices until the first Monday in March in each year. The stockholders of said company shall meet at their office in Covington, or some place to be designated by the president, and then proceed to elect a president and six directors, who shall be shareholders, and residents of the States of Kentucky and Ohio, who shall hold their offices one year, or until their successors shall be elected; public notice of such elections and meetings shall be given by the clerk or secretary of the company in some newspaper in Covington and Cincinnati, at least fifteen days previous thereto. At the annual meetings, a statement of the affairs of the company shall be made out by the president and directors, and presented to such meeting, and such dividends of the profits declared as shall be deemed advisable.

SEC. 6. That the concerns of said corporation shall be under the control of said president and directors and the president and three directors shall constitute a quorum to transact business—or, in the absence of the president, any four of the directors, one of whom shall act as president *pro tem.* The president and directors, after they have been duly elected as aforesaid, may make such assessments on the shares of said company as are subscribed, payable at such times as they may deem advisable, with such conditions of for-
16 feiture for noncompliance, not exceeding the amount of the stock delinquent, as they may deem proper. They are to open and renew the subscription for the shares not already subscribed, or sell them, and any forfeited shares, as they may think best for the company: Provided, however, that no stock be sold by them for less than the par value thereof.

SEC. 7. That it shall be the duty of the president and directors to appoint a clerk or secretary, and cause a record of their proceedings to be kept; they may also appoint a treasurer, and such other officers and agents as they may think needful for promoting said undertaking, and allow them such compensation as they may agree on, to make contracts, and to do all things necessary to carry them into immediate effect, and to require and take such bonds or other surety, in their corporate capacity, from any persons they may so appoint or contract with, and, in the event of death or resignation, or vacancy

from any cause, of the president or any director, the survivors, or a majority of them, shall supply such vacancy until the next annual election by the election of another stockholder.

SEC. 8. That the president and directors shall have the right to fix the rates of toll for passing over said bridge, and to collect the same from all and every person or persons passing thereon, with their goods, carriages or animals, of every description or kind. Toll-gates shall be kept, and tolls, received at each end of the bridge; and the rates of toll shall be posted up in some conspicuous place where the toll is demanded.

17 SEC. 9. That certificates of stock in said company shall be issued under the seal of said corporation, in the form and manner designated by the by-laws of said company, which shall designate the mode of transfer.

SEC 10. Void.

SEC. 11. That it shall be sufficient service of process on the corporation hereby created to execute a summons or other process on the president, clerk, or treasurer, of any of the directors, and process thus executed shall authorize judgment at the first term, as in other cases, if no appearance should be entered, or plea filed: Provided, however, that the president, secretary, or the treasurer and three directors, shall reside in Kentucky, and either the one or the other of these officers, with three directors, shall reside in the State of Ohio.

SEC. 12. Void.

SEC. 13. Void.

Passed February 17, 1846.

An Act to Confirm the Charter of the Covington and Cincinnati Bridge Company.

Whereas, the General Assembly of the Commonwealth of Kentucky, on the 17th day of February, in the year eighteen hundred and forty-six, enacted the foregoing statute:

Now, therefore, be it enacted by the General Assembly of the State of Ohio, That the Covington and Cincinnati Bridge Company, thereby created, shall be, and the same is hereby made, a body corporate and politic of this state, with the same franchises, rights and privileges, and subject to the same duties and liabilities, as are specified in the above recited act, in manner and form as though the said act were fully and at large set forth, section for section, word for

18 word, except:

That all other actions against the said Company may be brought in the courts of Hamilton County, notwithstanding anything in the eleventh section of the above recited act contained; and process may be served upon the said company, as process may be now served upon any other corporation of this state.

That nothing herein contained shall be construed to take away the jurisdiction of this state to the center of the said bridge, nor in any wise to acknowledge the jurisdiction of the Commonwealth of Kentucky this side of the said center. And it shall be the duty of the said company, in case the corporators thereof shall accept the provisions

of this act, to notify the Secretary of State of such acceptance in writing over the hands of a majority of the corporators named in the above recited act: provided, that such acceptance shall be made and filed within one year after the passage of this act.

March 26, 1849.

SECRETARY OF STATE'S OFFICE,
COLUMBUS, O., *December* 7, 1849.

It is hereby certified that William S. Johnson has this day deposited in this office an acceptance by William S. Johnson, George Carlisle, James Goodloe, M. M. Benton, John B. Casey, John K. McKnickle, F. G. Gedge, R. Buchanan and George M. Southgate of the Charter of the Covington and Cincinnati Bridge Company.

SAMUEL GALLOWAY,
Secretary of State.

By JOHN J. JANNEY, *Clerk.*

19 An Act to Amend the Act Confirming the Charter of the Covington and Cincinnati Bridge Company.

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the Covington and Cincinanti Bridge Company shall have power to enter upon any lands in the City of Cincinnati, from low water-mark in the Ohio River northwardly, not exceeding one hundred feet in width, to Front street, and appropriate the same for the purpose of constructing passages, ways and abutments for the bridge which the said company is authorized to erect: Provided, however, that no lands shall be entered upon and appropriated by virtue hereof, except such as lie between Walnut street and Western Row, in said city, and exclusive of the lands now used for public travel upon Vine, Race, Elm and Plum streets; and provided, furthermore, that if the said company should carry its passages or ways approaching the said bridge across Water street in the said city, it shall construct an arch under the same across the entire width of the said street, not less than thirteen feet in height at the center thereof, and eight feet in height over the sidewalk, according to the grade of the said Water street as at present established.

SEC. 2. That whenever any lands shall have been designated by the said company for appropriation, under the first section of this act, and the owner or owners thereof shall not agree with the said company as to the compensation to be made therefor, the said company may file in the clerk's office of the Court of Common Pleas of Hamilton County a full and exact description of the lands, so as aforesaid designated for appropriation, and the title of such lands shall exist in the said company, for the uses specified in the first section of this act, upon making the payment, or otherwise per-
20 forming the conditions, hereinafter expressed.

SEC. 3. That upon filing the description directed by the second section of this act, together with the petition reciting the disagreement of the owner or owners aforesaid with the said company, the clerk of the said court shall issue a citation to the owner or

owners aforesaid, if they be residents of Hamilton County, to show cause why the said appropriation should not be made, returnable in ten days from the test thereof, and why appraisers should not be appointed to estimate the damages which the said owner or owners may thereby sustain.

SEC. 4. Upon return of the citation aforesaid, unless good cause be shown to the contrary, the said court shall appoint twelve disinterested freeholders of the said city to appraise and estimate the damages which such owner or owners may sustain by reason of such appropriation, and return their appraisement and estimate thereof to the said court within ten days from the delivery to them of a certified copy of the order of the court in that behalf.

SEC. 5. That upon the return of the appraisement and estimate in the last section specified, the said company shall, unless as hereinafter excepted, pay to the clerk of the said court, for the use of the said owner or owners aforesaid, the just and full amount of the said appraisement and estimate, and pay to the said clerk also the cost of the proceedings upon such appropriation. And thereupon the said court shall adjudge the said lands to be appropriated to the said company for the purposes specified in the first section of this act, and shall enter such judgment at large upon its records. And the said company shall thenceforth hold and enjoy the said lands, for the purposes aforesaid, as the entire and perfect owner thereof.

21 SEC. 6. That if either the owner or owners of such lands, or the company, shall be dissatisfied with the said appraisement and estimate, the said court, upon written exceptions filed within ten days by either party, shall hear the matter, and thereupon, if necessary and just, direct a new appraisement and estimate, or make such other order in the premises as right and justice may demand: Provided, nevertheless, that all proceeding subsequent to the judgment of appropriation shall affect the amount of compensation only; and the said company may, upon payment into court of the amount of the first appraisement and estimate, take possession of the lands as aforesaid designated, and use them as specified in the first section of this act.

SEC. 7. That any time before judgment of appropriation, as specified in the fifth section of this act, the said company may discontinue its proceedings, and abandon the appropriation upon payment of costs.

SEC. 8. That if any owner of any of the lands, so as aforesaid designated for appropriation, be insane, infant or a married woman, the said company shall proceed in all respects as herein directed in the case of an owner or owners disagreeing, and shall cause the fact of insanity, infancy or coverture to be stated in the petition hereinbefore directed to be filed. And the court may either admit the general guardian of the insane person or infant, or the husband of the married woman, to defend, or may appoint a guardian *ad litem* for that purpose.

SEC. 9. That if any owner of lands, as aforesaid, be not a resident of Hamilton County, and not found (upon process issued) within the said county limits, the court shall, by order entered of record,

direct the manner of giving notice to such owner; and, upon proof of compliance with such order by the said company, the said
22 owner shall be deemed to be in court as if personally cited.

SEC. 10. That if any of the lands, so as aforesaid designated for appropriation, shall be incumbered by mortgage, judgment, lease, or otherwise, at the date of the filing of the petition hereinbefore specified, the said company shall cause th- mortgage, judgment creditor, lessee, or other incumbrancer, to be made a party defendant to the proceedings herein directed to be instituted.

SEC. 11. That nothing herein shall be construed to prevent the said company from acquiring by deed of purchase, or gift, or devise, any lands for the purposes specified in the first section of this act.

Passed March 20, 1850.

An Act to Amend the Charter of the Covington and Cincinnati Bridge Company.

SECTION 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the act of Assembly approved February, 1846, incorporating the Covington and Cincinnati Bridge Company, be and the same is hereby so amended as to increase the capital stock of said company, making the capital stock seven hundred thousand dollars, divided into shares of one hundred dollars each.

SEC. 2. That said company may sell one hundred thousand dollars of its capital stock to the City of Covington, to be subscribed and paid as may be agreed by said company and said city; and, in payment of said one hundred thousand dollars, the said city may sell her bonds to the amount of one hundred thousand dollars, the
23 amount of every bond, and the time and places of the payment of the principal and interest, to be fixed by said city; and the city is hereby authorized to levy a tax of ten cents upon every one hundred dollars' worth of taxable property therein in 1856 and 1857 for the purpose of paying the interest on said bonds.

Approved February 25, 1856.

An Act to Amend the Charter of the Covington and Cincinnati Bridge Company.

SECTION 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the Covington and Cincinnati Bridge Company shall have full power and authority to proceed and condemn any and all real property that may be necessary for the location, erection or convenience of its bridg- toll-house, abutments, piers, anchor pits or approaches to said bridge, or to be in any way and for the convenience of the same, under a writ of *ad quod damnum*. The mayor of the City of Covington or the county judge of Kenton County may issue the writ upon the application of said company, and shall preside at the trial, which shall be held at the mayor's office in said city, or other convenient place designated by the officer issuing the writ; and the jury summoned by virtue of said writ shall

consist of twelve freeholders, who, upon view of the property to be condemned, and, if necessary, hearing testimony, shall assess the cash value in damages which the proprietor or proprietors — said property will sustain by the appropriation of the same in the manner proposed. At least five days' notice shall be given prior to the trial when the proprietor or proprietors of the property reside in the State of Kentucky; and when the proprietor of such property shall be non-resident of or absent from the state, and personal service can not be had, then at least thirty days' notice shall be given in a newspaper published in Covington, and in one published in Cincinnati, Ohio; and notice shall be served upon the agent of the proprietor, if he has one in the state. Should either the bridge company or any proprietor of such property be dissatisfied with the finding of the jury, an appeal may be taken to the Circuit Court of Kenton County, when the trial shall be had as in other ordinary cases. Should the bridge company wish to use the property during the pendency of an appeal, it may do so on depositing the amount of the finding, in any specie-paying bank in Covington, to the credit of the proprietor or proprietors of the property.

SEC. 2. Void.

SEC. 3. Void.

SEC. 4. That copies of the records or papers of said company, belonging to its office, certified by the secretary of said company, shall be evidence in all courts and places where the originals would be

SEC. 5. Dividends may be declared by said company, either monthly, quarterly, semi-annually or annually.

SEC. 6. That said company may borrow money, not exceeding six hundred thousand dollars ($600,000), on the credit of the corporation, and may pledge any and all of its property, rights, tolls, income and franchises by mortgage, for the security and payment of the interest and principal of any of its debts, and may issue bonds therefor at such rates of interest, and payable (the principal and interest) at such times and places, and to such amounts, as the directors of said company shall deem requisite for its interest, and may sell and dispose thereof at such rates and on such terms as the company may determine. The bonds issued by the company, or any portion thereof, may be made and issued convertible into the stock of the company on such conditions as the company may prescribe.

SEC. 7. That when the stockholders of said company, at any regular meeting, or at any meeting called by order of the directors, adopt the above amendments or any portion thereof, the portion so adopted shall become a part of the charter of the company, and a portion may be adopted from time to time. A majority of the stock subscribed shall be necessary therefor.

Approved February 6, 1858.

26 An Act Supplementary to an Act to Confirm the Charter of the Covington and Cincinnati Bridge Company.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. Void.

SEC. 2. That copies of the records and papers of said company, belonging to its office, certified by the secretary of said company, shall be evidence in all courts and places where the originals would be.

SEC. 3. Dividends may be declared by said Company either monthly, quarterly, semi-annually or annually.

SEC. 4. That said company may borrow money, not exceeding six hundred thousand dollars ($600,000), on the credit of the corporation, and may pledge any and all of its property, rights, tolls, income and franchises, by mortgage, for the security and payment of the interest and principal of any of its debts, and may issue bonds therefor at such rates of interest, payable (the principal and interest) at such times and places, and to such amounts, as the directors of said company shall deem requisite for its interest, and may sell and dispose thereof at such rates and on such terms as the company may determine. The bonds issued by the company, or any portion thereof, may be made and issued convertible into the stock of the company, on such conditions as the company may prescribe.

SEC. 5. That said company shall not exercise any of the powers granted in this act until the stockholders of said company, at a regular meeting thereof, or at any meeting called by order of the directors, have, by vote, authorized the president and directors to exercise the same. Notice of the intention to apply to the stockholders for their consent to the exercise of such powers, or either of them, as are herein conferred shall be given in at least one
27 newspaper of general circulation in the City of Cincinnati, and one in the City of Covington, Ky., for two successive weeks, and such notice shall state the time, place and object of such meeting. Application may be made to the stockholders of said company for the exercise of either of the powers herein granted at different times, but it shall take a vote of a majority of all the stock subscribed to authorize the exercise of the same.

April 2, 1858.

An Act to Amend the Charter of the Covington and Cincinnati Bridge Company.

SECTION 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the capital stock of the Covington and Cincinnati Bridge Company be, and the same is hereby, increased to one million of dollars, divided into ten thousand shares of one hundred dollars each.

SEC. 2. That said company is authorized to receive subscriptions for the sum of five hundred thousand dollars one half of its capital stock, in preferred stock, and to pledge the revenues of the company for the payment of the dividends thereon as hereinafter provided:

Provided, that it shall be lawful to prefer such stock to the extent of fifteen per cent. per annum, and not more.

SEC. 3. That when said company shall deem it expedient to issue preferred stock they shall give notice thereof by advertisement in at least one newspaper of general circulation in each of the Cities of Covington and Cincinnati: Provided, that for sixty days after the books for such preferred stock shall be opened the prefer-
28 ence in such subscription shall be given to those who may have before that time subscribed and paid for the non-preferred stock in said company; and provided, further, that if the full amount of said sum of five hundred thousand dollars shall not be subscribed for within sixty days, as above provided for, then said subscription shall be open, as to the remainder of said sum, to all who may desire to subscribe for such preferred stock.

SEC. 4. That the preferred stock so subscribed for shall receive, out of the net earnings of the company, a dividend, payable semi-annually, of fifteen per cent. per annum; Provided, that the net earnings of the company shall amount to a sum equal to fifteen per cent. per annum on the amount of such preferred stock; and provided further, that no dividend shall be declared on the non-preferred stock until the net earnings of the company shall pay said dividends on the preferred stock.

SEC. 5. That the preferred stock so subscribed for shall be payable at such time and in such installments, not exceeding ten per cent., each thirty days, as shall be ordered by the directors of said company, and shall be subject to the provisions of the sixth section of the act, to which this is an amendment, passed February 17, 1846.

SEC. 6. That when the amount of any subscription to such preferred stock shall be paid, such subscribers shall be entitled to receive a certificate for the number of shares they subscribed and paid for, setting forth that the holder is preferred, as provided in this act, and such stock shall be transferable as other stock of the company.

SEC. 7. That the company shall not be allowed to receive subscriptions for, nor to issue, preferred stock, as herein provided, until the stockholders of the company, who may before that time have subscribed and paid for non-preferred stock in said company, at a regular meeting, or at a meeting called by order of the directors,
29 shall authorize the same to be done; a majority of the stock so subscribed shall be necessary to give the authority to receive and issue such preferred stock.

SEC. 8. This act shall take effect from its passage.

Approved February 5, 1861.

An Act to Amend the Charter of the Covington and Cincinnati Bridge Company.

SEC. 1. Be it enacted by the General Assembly of the State of Ohio, That the capital stock of the Covington and Cincinnati Bridge Company be, and the same is hereby, increased to one million dollars, divided into ten thousand shares of one hundred dollars each.

SEC. 2. That said company is authorized to receive subscriptions

for the sum of five hundred thousand dollars, one half of its capital stock, in preferred stock, and to pledge the revenues of the company for the payment of the dividends thereon as hereinafter provided: Provided, that it shall be lawful to prefer such stock to the extent of fifteen per cent. per annum, and not more.

SEC. 3. That when said company shall deem it expedient to issue preferred stock, they shall give notice thereof by advertisement in at least one newspaper of general circulation in each of the Cities of Covington and Cincinnati: Provided, that for sixty days after the books for such preferred stock shall be opened the preference in such subscription shall be given to those who may before that time have subscribed and paid for the non-preferred stock in said company; and provided, further, that if the full amount of said sum of five hundred thousand dollars shall not be subscribed for within sixty days, as above provided for, then said subscription shall be open, as to the remainder of said sum, to all who may desire to subscribe for such preferred stock.

SEC. 4. That the preferred stock so subscribed for shall receive, out *to* the net earnings of the company, a dividend, payable semi-annually, of fifteen per cent. per annum; provided, that the net earnings of the company shall amount to a sum equal to fifteen per cent. per annum on the amount of such preferred stock; and provided, further, that no dividend shall be declared on the non-preferred stock until the net earnings of the company shall pay said dividends on the preferred stock.

SEC. 5. That the preferred stock so subscribed for shall be payable at such times and in such installments, not exceeding ten per cent. each thirty days, as shall be ordered by the directors of said company, and shall be subject to the provisions of the sixth section of the act, to which this is an amendment, passed February 17, 1846.

SEC. 6. That when the amount of any subscription to such preferred stock shall be paid, such subscribers shall be entitled to receive a certificate for the number of shares they subscribed and paid for, setting forth that the holder is preferred, as provided in this act, and such stock shall be transferable, as other stock of the company.

SEC. 7. That the company shall not be allowed to receive subscriptions for, nor to issue, preferred stock, as herein provided, until the stockholders of the company who may before that time have subscribed and paid for non-preferred stock in said company, at a regular meeting, or meeting called by order of the directors, shall authorize the same to be done; a majority of the stock so subscribed shall be necessary to give the authority to receive and issue such preferred stock.

SEC. 8. This act shall take effect from its passage.

Passed April 3, 1861.

An Act to Amend an Act Entitled An Act to Amend the Charter of the Covington and Cincinnati Bridge Company.

SECTION 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the elevation of the bridge in process

of construction by the Covington and Cincinnati Bridge Company, at the center of the river, shall not be less than one hundred feet above low water-mark; and to this extent said charter of said company is hereby amended .

SEC. 2. Any and all portions of the charter of the Covington and Cincinnati Bridge Company inconsistent herewith are hereby repealed.

SEC. 3. This act shall take effect from and after its passage.

Approved January 12, 1863.

An Act to Amend the Charter of the Covington and Cincinnati Bridge Company.

SECTION 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the capital stock of the Covington and Cincinnati Bridge Company be, and the same is hereby, increased to one million two hundred and fifty thousand dollars, divided into shares of one hundred dollars each, and the increased stock of two hundred and fifty thousand dollars be made preferred stock to the same extent, and shall be provided for, and the holders thereof shall have and enjoy all the benefits, advantages and immunities that the holders of the present preferred stock have, and to which they are entitled.

32 SEC. 2. That when said company shall determine to issue more preferred stock, they shall give notice, by publication in a newspaper circulating in Cincinnati and Covington, of the opening of the books thereof, and the present stockholders shall have the privilege of subscribing for the same to the exclusion of others for thirty days, at the expiration of which period, if the board of directors deem it advisable, and as much stock has not been subscribed as desired, then others may be allowed to make subscriptions for such stock.

SEC. 3. The company may prescribe such terms to the subscribers of the said increased stock as will make the peferred stockholders equal, by charging interest upon such subscriptions at such rate as shall be deemed equitable, and it may also fix the terms of payment and declare forfeited any stock to the use of the company upon which any call shall remain due for thirty days after demand, in person or at the subscriber's residence or place of business, or by notice published for one week in some newspaper circulating in Cincinnati or Covington.

SEC. 4. Before subscriptions shall be received to such increased preferred stock, the stockholders shall have approved the same at a regular meeting or called meeting for the purpose, and a majority of the stock represented at such meeting shall be necessary to give such authority.

SEC. 5. That the company may create a sinking fund for the payment of its debts, and to that end may annually set apart such portion of its earnings as may, by the board of directors, be considered proper, and the fund thus created may be vested in such manner as the board of directors may deem most safe and lucrative.

SEC. 6. Void.

33 SEC. 7. This act shall take effect from its passage.
Approved January 21, 1865.

An Act to Regulate Companies Incorporated for the Construction of Bridges Across the Ohio River.

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That it shall be lawful for any company, herebefore incorporated and organized under any law in this state, for the purpose of erecting and constructing a bridge across the Ohio River, or for any company which may hereafter be formed under the laws of this state for said purpose, upon a vote to that effect of the owners of a majority of the stock previously subscribed and paid for, to increase its capital stock to any amount that may be deemed necessary for said purpose, not exceeding two million dollars, divided into shares of one hundred dollars each, and such company is authorized to make such increased stock preferred stock, and to pledge the revenues of the company for the payment of the dividends therein, to the extent and in the manner hereinafter provided.

SEC. 2. That when any such company shall determine to issue such increased or preferred stock, they shall give notice, by publication in a newspaper of general circulation in the counties where such bridge is located, of the opening of the books thereof, and the stockholders of said company shall have the privilege of subscribing for the said increased or preferred stock, to the exclusion of others, for thirty days after such publication, at the expiration of which period, if the board if directors deem it desirable, and if as much stock has not been subscribed as desired, then others may be allowed to make subscription for such stock.

34 SEC. 3. Such company may prescribe such terms to the subscribers of the said increased stock as will make the preferred stockholders equal, by charging interest on such subscriptions at such rate as shall be deemed equitable; and it may also fix the terms of payment, and declare forfeited any stock, to the use of the company, upon which any call shall remain due for thirty days after demand, in person or at the subscriber's residence or place of business, or by notice published for one week in some newspaper of general circulation in the county in which such bridge is located.

SEC. 4. That the preferred stock so subscribed for shall receive, out of the net earnings of the company, a dividend, payable semi-annually, of fifteen per centum per annum, and no more: Provided, that the net earnings of the company shall amount to a sum equal to fifteen per centum per annum on the amount of such preferred stock; and provided, further, that no dividend shall be declared on the non-preferred stock until the net earnings of the company shall pay said dividends on the preferred stock.

SEC. 5. Before subscriptions shall be received to such increased or preferred stock, the stockholders shall have approved the same at a regular meeting, or called meeting for the purpose, and a majority of the stockholders shall be necessary to give such authority.

SEC. 6. That on the full payment of any subscription of such increased or preferred stock, the subscribers shall be entitled to receive a certificate for the shares so taken and paid for, setting forth their character as increased or preferred stock, as the case may be; and such stock shall be transferable as other stock of such company.

SEC. 7. That the company may create a sinking fund for the payment of its debts, and to that end may annually set apart such portion of its earnings as may, by the board of directors, be considered proper; and the fund thus created may be vested in such manner as the board of directors may deem most safe and lucrative.

SEC. 8. That such company may borrow money, not exceeding six hundred thousand dollars ($600,000), on the credit of the corporation, and may pledge any and all of its property, rights, tolls, income and franchises, by mortgage, for the security and payment of the interest and principal of any of its debts, and may issue bonds therefor, payable (the principal and interest) at such times and places, and to such amounts, as the directors of said company shall deem requisite for its interest, and may sell and dispose thereof at such rates, and on such terms, as the company may determine. The bonds issued by the company, or any portion thereof, may be made and issued convertible into the stock of the company on such conditions as the company may prescribe.

SEC. 9. That any such company may fix or change the span and altitude of any bridge which it may erect and construct across the Ohio River: Provided, that the span of any such bridge be not less than the Ohio River, at the point where the same is located, at low water-mark; and the height of any such bridge in the center shall not be less than one hundred feet above the surface of the water at low water-mark.

SEC. 10. Any company, heretofore or hereafter incorporated under any law of this state for the purpose aforesaid, may accept and become entitled to the powers and privileges herein provided, by filing in the office of the Secretary of State a certificate of the acceptance by a vote of the owners of a majority of the stock in which company, authenticated under their seal and the hands of their president and secretary, which certificate shall be recorded and kept by the Secretary of State.

SEC. 11. This act shall take effect and be in force from and after its passage.

March 16, 1865.

An Act to Amend the Charter of the Covington and Cincinnati Bridge Company.

SECTION 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the said company, after the election in eighteen hundred and sixty-nine, shall hold its annual election for officers, and have its regular meetings for stockholders, on the second Wednesday in January, and then the annual report of the company shall be made. All stockholders who have paid-up stock

shall be entitled to vote in person or by proxy, on*w* vote for each share of stock so held, and the authority to the proxy need not be recorded

SEC. 2. That said company shall construct, or purchase, and use such manufacturing establishments, machine shops, tools, machinery and apparatus connected therewith as may we considered necessary in making repairs, improvements and conveniences to and about said bridge or the approaches thereto, or for the use thereof, to promote the facilities of travel and transportation, or to the advantage of the company; and may purchase, hold or rent property for these purposes; and may purchase, hold and run ferries from and to the City of Covington, and do and perform all the necessary acts in relation thereto; but the rates of ferriage shall be subject to the control of the courts, as in case of ferries owned by individuals; and such ferry or ferries shall be established by the county court, as other ferries, upon the application of said Covington and Cincinnati Bridge Company, and when so established shall, in every
37 respect, be regulated, controlled and governed by the law of this commonwealth in relation to ferries, and shall be required to give the same bond, and shall in all respects be held to its same responsibilities, as other ferries; and the right of said bridge company to run a ferry, or ferries, shall be forfeited in the same manner, and for the same causes, as other ferries are forfeited: Provided, that nothing herein contained shall be so construed as to, in any manner, abridge or interfere with the rights or privileges of the present or any future owner or proprietor of any ferry or ferries between the Cities of Covington and Cincinnati, to use and run the same, as is now or may hereafter be provided by law, nor to interfere with the establishment of any other ferries to run to and from the City of Covington.

SEC. 3. That this act shall take effect from and after its passage.

Approved February 23, 1869.

An Act for the Regulation of Bridge Companies.

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That it shall be lawful for all companies which heretofore have been, or hereafter may be, incorporated and organized under any law of the State of Ohio, for the purpose of constructing a bridge across the Ohio River, to prescribe the time at which their annual elections and meetings of stockholders shall be held; and at all elections holders of paid-up stock shall be entitled to vote, either in person or by proxy, one vote for each share held by them, and the authority of the proxy need not be recorded.

SEC. 2. That such companies may purchase, hold or receive grants for and run ferries within one-half mile of such bridges across said river, and do and perform all the necessary acts
38 in relation thereto; but the rates of ferriage shall be subject to the control of the authorities as in the case of ferries owned and run by individuals.

SEC. 3. This act shall take effect from and after its passage.

Passed May 7, 1869.

An Act to Establish a Bridge Across the Ohio River at Cincinnati, Ohio, a Post Road.

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the bridge across the Ohio River at Cincinnati, in the State of Ohio, and at Covington, in the State of Kentucky, is hereby declared to be, when completed in accordance with the laws of the States of Ohio and Kentucky, a lawful structure and post-road for the conveyance of the mails of the United States.

Approved February 17, 1865.

An Act for the Protection of Bridges Across the Ohio River.

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That if any person shall willfully burn or otherwise destroy, or shall willfully attempt to burn or destroy, any toll bridge, or any part thereof, erected or that may hereafter be erected across the Ohio River, he shall be deemed guilty of felony, and shall be imprisoned in the penitentiary not less than three nor more than ten years.

39 SEC. 2. That if any person shall willfully injure such bridge, or any part thereof, or the approach thereto, or without authority take up or remove the paving, or any part of it, or the planks in the bridge floor, or the tracks or rails, or place any obstruction upon the bridge or upon said approach, or willfully impede any foot passengers, or vehicles, or live stock, in crossing such bridge, without the assent of the company or owner of such bridge, or the keeper thereof, he shall be deemed guilty of a misdemeanor, and shall be fined at the discretion of the court, and imprisoned in the county jail not exceeding one year.

SEC. 3. If any person shall willfully destroy or deface any sign, notice, card or table of rules or rates posted and put up at said bridge by the company, or owner or keeper, for the information of the public, or shall, without authority, alter, take down or remove the same, he shall be fined in any sum not less than ten nor more than fifty dollars, before any justice of the peace or court of record having proper jurisdiction.

SEC. 4. That if any person shall, with the intent to defraud the company or owner of such bridge, fail or refuse to pay the toll required when crossing, or shall attempt to evade the payment thereof, he shall be fined in any sum not less than five nor more than twenty dollars.

SEC. 5. That all bridge companies and owners are hereby invested with full power and authority to make and enforce any rule or regulation which shall be deemed necessary or requisite to preserve and protect their property and collect their tolls; and they may prevent any person from crossing such bridge on foot, or by riding or driving any team or vehicle, or from driving any stock, who fails to pay the regular fare when demanded; and the police or watchmen

of such bridge shall have and are hereby endowed with all
40 the power and authority of policemen of cities, and may arrest any person who violates the law or rules of such bridge company without warrant, at or upon such bridge, and take him before the proper civil authority, to be dealt with according to law.

SEC. 6. That if any person shall ride or drive any team across or upon said bridge at a gait faster than a walk, such person shall be fined in a sum not less than five nor more than ten dollars.

SEC. 7. That when any company or owner of such bridge shall issue and sell tickets in commutation of fare for the convenience of and to favor the public and those who frequently cross such bridge, or shall sell packages of tickets at a reduced rate below single fare, it shall not be lawful for any person to make traffic of the same, nor to resell such tickets at the same or at a less rate than the company charge for single fares, and any person violating this section shall be fined five dollars for each offense.

SEC. 8. That is any person shall forge or counterfeit any check, tickets, order or pass, written or printed, issued or purporting to have been issued by said bridge company or owner, or shall knowingly have such forged or counterfeited check, ticket or order in possession, with intent to defraud the said company or owner, he shall, upon conviction thereof, be imprisoned in the penitentiary not less than one nor more than five years.

SEC. 9. That all fines imposed by virtue of this act in amounts less than one hundred dollars shall be imposed and enforced as provided in section third; shall be prosecuted for in the name of the State of Ohio, and shall be for the use of the common school fund of the city or town in which said bridge, or any part thereof shall be located.

41 SEC. 10. This act shall take effect from and after its passage.

April 12, 1867.

An Act to Protect Bridges Across the Ohio River.

SECTION 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That if any person shall willfully burn or otherwise destroy, or willfully attempt to burn or destroy, any toll bridge, or any part thereof, erected or that may be erected across the Ohio River within this commonwealth, in whole or in part, he shall be deemed guilty of felony, and shall be imprisoned in the penitentiary not less than five nor more than twenty years.

SEC. 2. That if any person or persons shall forge or counterfeit any ticket or pass of any bridge company in this commonwealth with intent to defraud such company or any individual, or shall knowingly have in his or her possession any such forged or counterfeit ticket or pass, with intent to use, sell or otherwise dispose of the same, such person shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary for a period of not less than one nor more than two years.

SEC. 3. That if any person shall willfully injure such bridges, or

any part thereof, or the approaches thereto, or without authority take up or remove the paving or any part of it, or the planks in the bridge floor, or the tracks or rails, or place any obstructions upon the bridge or upon the approaches, or willfully impede any foot passengers, or vehicle, or stock, in crossing such bridge, without the assent, or contrary to the rules, of the company or owner of such bridge, or
42 the keeper thereof, he shall be deemed guilty of a misdemeanor and shall be fined at the discretion of a jury, and imprisoned in the county jail not exceeding one year.

SEC. 4. That if any person shall willfully destroy or deface any sign, notice, card or table of rules or rates posted and put up at said bridge by the company, owner or keeper, for the information of the public, or shall, without right or authority, alter, take down or remove the same, he shall be fined not less than ten nor more than fifty dollars, before the mayor or police judge of a city, county judge, or justice of the peace, and shall be imprisoned till the fine be paid.

SEC. 5. That if any person shall, with the intent to defraud the company or owner of such bridge, fail or refuse to pay the toll required when crossing, or shall attempt to evade the payment thereof, he shall be fined from five to ten dollars.

SEC. 6. That all bridge companies and owners are hereby invested with full power and authority to make and enforce any rule or regulations, not inconsistent with their charters or the laws of this state, which shall be deemed necessary or requisite to preserve and protect their property and collect their tolls, and they may prevent any person from crossing such bridge on foot, or by riding or driving any team or vehicle, or from driving any stock, who fails to pay the regular fare when demanded; and the police or watchmen of such bridge shall have, and are hereby invested with, all the power and authority of policemen of cities, and may arrest any violator of the law or the rules of such bridge company without warrant, and take him before the proper civil authority, to be dealt with according to law.

SEC. 7. That if any person shall ride or drive any team, or willfully drive any stock, across or upon said bridge faster than — walk, such person shall, upon conviction before a justice of the
43 peace, or police judge, be fined from five to ten dollars.

SEC. 8. That when any company or owner of such bridge shall issue and sell tickets in commutation of fare, for the convenience of and to favor the public and those who frequently cross such bridge, or shall sell packages of tickets at a reduced rate below single fares, it shall not be lawful for any person to make traffic of the same, nor to resell such tickets at the same or at a less rate than the company charge for single fares, and any person violating this section shall be fined from five to ten dollars for each offense.

SEC. 9. That all fines imposed by virute of this act, in amounts less than one hundred dollars, shall be imposed and enforced as provided in section third, shall be prosecuted for in the name of the commonwealth, and shall be for the use of the common school fund of the city or town in which such bridge shall be located.

SEC. 10. This act shall take effect from and after its passage.

Approved March 4, 1867.

An Act Supplementary to an Act Approved December 17, 1872, Entitled "An Act to Authorize the Construction of Bridges Across the Ohio River, and to Prescribe the Dimensions of the Same."

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the act of congress approved December 17, 1872, entitled "An Act to Authorize the Construction of Bridges across the Ohio River, and to prescribe the Dimensions of the same," shall be, and the same is hereby, amended by striking out sections two and four of said act, and substituting therefor the following:

SEC. 2. That every bridge hereafter erected across the Ohio
44 River shall have its axis at right angles to the current at all stages, and all of its spans shall be through spans. Every such bridge shall have at least one channel span, placed over that part of the river usually run by descending coal fleets; said channel span to give a clear water-way between the piers of five hundred feet, measured on the low water line. Said channel span shall be at least forty feet above local highest water, measured to the lowest part of the span, and shall be at least ninety feet above low water, in bridges built above the mouth of the Big Sandy River, and at least one hundred feet above low water, in bridges built below the mouth of the Big Sandy River, measured to the lowest part of the span: Provided, however, that all bridges over the Ohio River below the Covington and Cincinnati Suspension Bridge shall have, in addition to the channel span prescribed above, a pivot draw giving two clear openings of one hundred and sixty feet each, measured at right angles to the current at high stages, and located in a part of the bridge that can be safely and conveniently reached at such stages; that said draw shall be provided with suitable rest piers above and below the pivot pier, and suitable floats or crib work connecting said rest piers with the pivot pier, to enable boats to pass through said draw with safety. That in case said draw span is near either shore the bridge company, by purchase *to* otherwise, shall extinguish the right of mooring boats or other water craft to the adjacent shore, for a distance of at least seven hundred feet above and seven hundred feet below the bridge. And that said draw shall be opened promptly, upon reasonable signal, for the passage of boats whose construction
45 shall not be such as to admit of their passage under the stationary spans of said bridge, except when trains are passing over the same; but in no case shall unnecessary delay occur in opening said draw before or after the passage of a train. Provided, further, that in lieu of the high draw prescribed above, bridges over the Ohio River below the Covington and Cincinnati Suspension Bridge may be built as continuous bridges with a clear height of fifty-three feet above local highest water, measured to the lowest part of the channel span.

SEC. 4. That any person, company or corporation authorized to construct a bridge across the Ohio River shall give notice by publication for one week in newspapers having a wide circulation, in not less than two newspapers in the Cities of Pittsburgh, Cincinnati

and Louisville, for bridges above the mouth of the Big Sandy, and in the Cities of Pittsburgh, Cincinnati, Louisville, St. Louis, Memphis and New Orleans for bridges below the mouth of the Big Sandy, and shall submit to the Secretary of War, for his examination, a design and drawings of the bridge and piers and a map of the location, giving for the space of at least one mile above and one mile below the proposed location the topography of the banks of the river and the shore lines at high and low water. This map shall be accompanied by others drawn on the scale of one inch to two hundred feet, giving for the space of one-half a mile above the line of the proposed bridge, and a quarter of a mile below, an accurate representation of the bottom of the river by contour lines two feet apart, determined by accurate soundings, and also showing, over the whole width of this part of the river, the force and direction of the currents at low water, at high water, and at least one intermediate stage, by triangulated observations on suitable floats. The maps shall also show the locations of other bridges in the vicinity, and shall give such other information as the Secretary of War
46 may require for a full and satisfactory understanding of the subject. Said maps and drawings shall be referred to a board of engineers for examination and report, which board shall personally examine the site of the proposed bridge, and shall hold a public session at some convenient point to hear all objections thereto, of which public session due notice and invitation to be present shall be given to all interested parties. And if said board of engineers reports that the site is unfavorable, the Secretary of War shall be authorized, on the recommendation of said board, to order such changes in the bridge or its piers, or such guiding dikes or other auxiliary works as may be necessary, at the expense of the proprietors or managers of such bridge, or piers and other works for the security of navigation. And the proposed bridge shall only be a legal structure when built as approved by the Secretary of War.

SEC. 5. That the right to alter, amend or repeal this act, as set forth in section seven of the act hereby amended, is hereby reserved.

Approved February 14, 1883.

Memoranda.

February 12, 1859.—Stockholders accepted amendments passed by Legislature of Kentucky, February 6, 1858 and by the Legislature of Ohio, April 2, 1858, increasing capital stock $300,000, and authorizing issue of preferred stock.

April 25, 1861.—Stockholders accepted amendments passed by Legislature of Kentucky, February 5, 1861, and by Legislature of Ohio, Aril 3, 1861, increasing capital stock to one million dollars ($1,000,000), one-half to be preferred stock, and authorizing issue of such preferred stock.

April 5, 1865.—Stockholders accepted amendments passed by Legislature of Kentucky, January 21, 1865, and by Legislature of Ohio, March 16, 1865, increasing capital stock to $1,250,000,
47 of which $750,000 should be preferred stock, and authorizing the issue of such preferred stock.

January 8, 1873.—Stockholders waived privileges of section seven of act passed by the Legislature of Ohio, March 26, 1849, and substituted in lieu thereof the rendering of a return for taxation under the general law.

By-Laws of the Covington and Cincinnati Bridge Company.

ARTICLE 1.—*Officers.*

The officers of this Company shall consist of a President, Vice-President, Secretary, Assistant Secretary and Treasurer.

ARTICLE 2.—*Elections.*

SECTION 1. Elections for President and Directors shall be held at the office of the Company in Covington, Ky., on the second Wednesday in January in each year, between such hours as the Board of Directors may designate, and shall be under the control of three stockholders who are not candidates for Directors, and who shall be appointed by the Board.

SEC. 2. All vacancies in the office of President or Directors occur-ing during the term for which said officer shall have been elected shall be fil-ed by the Board of Directors. The Board of Directors shall also elect the Vice-President, Secretary, Assistant Secretary, Treasurer and such other officers and agents as the interests of the Company may from time to time require, and fix their compensation.

The Vice-President and Secretary shall be chosen from the Board of Directors.

48 The Treasurer may be any good, sound and substantial bank that the Board may select.

ARTICLE 3.—*Meetings.*

The regular meetings of the Board of Directors shall be held at their office in Covington, Ky., on the first Tuesday in the months of January, April, July and October, and on the second Wednesday in January in each year.

The annual meeting in January shall be held immediately after the annual election, at which time the report of the judges of the the election shall be presented. The quarterly meetings shall be held at 3 o'clock P. M., unless otherwise ordered by the Board.

Special meetings may be called by the President, or upon the written request of three (3) members of the Board.

The new Board of Directors shall convene for organization on the second Wednesday in each January immediately after the adjournment of the old Board.

ARTICLE 4.—*Duties of Officers.*

SECTION 1. The President shall preside at all meetings of the Board. He shall preserve order, and sign the records of the proceed-

ings when approved by the Board. He shall have charge of the common seal of the Company, and all the books, documents and correspondence belonging to the Company shall be under his general supervision. He shall have power to call the Board together whenever he deems it for the interests of the Company so to do, or shall be requested so to do by three members in writing. He shall exercise general control over all the affairs of the Company, shall see that the By-Laws are faithfully executed, and shall give his personal time and attention to all the affairs and interests of the Company. He shall see that all bonds are executed, and all contracts by and with the Company properly executed and filed,
49 He shall carry into effect all orders of the Board, and submit for their consideration such subjects as in his judgment will promote the interests of the Company. He shall appoint all committees, unless otherwise ordered by the Board; he shall sign all orders, checks and contracts of the Company, and he shall have power to hire and discharge all employes of the Company, other than those appointed by the Board of Directors. He shall also do and perform such other duties as may be from time to time required of him by the Board.

SEC. 2. The Vice-President shall, in the absence of the President, do and perform all the duties and functions pertaining and belonging to the office of President of the Company.

In the absence, inability or refusal of both President and Vice-President to serve, the Board may appoint a President "pro tem.," who shall, for the time being, exercise all the duties of the President.

SEC. 3. The Secretary shall sign all stock certificates, bonds, coupons, deeds and such other instruments of writing as the Board may direct.

SEC. 4. The Assistant Secretary shall attend the meetings of the Board and keep a faithful record of their proceedings in a book kept for that purpose, which shall be open at all times for the inspection of any member of the Directory. He shall draw all checks on the Treasurer and present them to the President for his signature, and shall countersign the same. He shall give bond, with approved security, in such sum as the Board of Directors may from time to time require. It shall be his duty to deposit, as far as practicable, daily with the Treasurer, the money received by him, and he shall perform such other duties as the Board may require.

50 SEC. 5. The Auditing Committee, appointed at the annual meeting, shall consist of the President and two Directors, who shall meet, as nearly as may be, on the first day of every month, at an hour to be fixed by them, and audit the accounts of the Assistant Secretary. They shall perform such other duties as the Board shall devolve upon them, and shall receive such compensation as the Board shall from time to time determine.

ARTICLE V.—*Contracts.*

No officer or employe of the Company shall make any purchases for, or contract in behalf of, this company unless specially authorized

so to do, except the President, and he only to the extent of $200; but he may, in connection with the Auditing Committee, so contract up to the sum of $500. All purchases and contracts above the sum of $500 shall be made only upon the order of the Board of Directors: Provided, that this by-law shall not be held to include the employment, payment or discharge of the hands usually required for the service of the Company.

ARTICLE VI.—*Voting by Proxy.*

At any election for President or Directors, stockholders are authorized to vote their stock in person or by written proxy, provided the shares have been held by them, and so recorded, on the books of the company, three months prior to the date of such election.

ARTICLE VII.—*Certificates of Stock.*

SECTION 1. Certificates of stock shall be issued to each stockholder for the number of shares he, she or they may have in the Company, which certificate shall be signed by the President, and countersigned by the Secretary, with the seal of the Company annexed, and registered in a book kept by the Assistant Secretary for that purpose.

SEC. 2. Stock shall be assigned by transfer only upon the books of the Company, either in person or by attorney; and, in cases of transfer, no new certificates shall be issued unless the old certificates shall have been previously surrendered; and it shall be the duty of the Assistant Secretary to cancel and attach such old certifi-
51 cates to the original stubs from which they were taken. No certificate of stock shall be signed in blank, and the seal of the Company shall not be attached until after it shall have been signed by both the President and Secretary.

SEC. 3. Certificates may be issued in place of former certificates, lost or destroyed, on proof being made by affidavit, or otherwise, to the satisfaction of the President and Directors, that the former certificates have been lost or destroyed, without having been in any way transferred, assigned or pledged, and that the same still remains the property of the applicant. The applicant having advertised the loss of such certificates, in such form and in such newspapers circulating in Cincinnati and Covington as the President of this Company may direct, for at least one insertion per week for eight weeks, and said applicant giving bond to the company to the satisfaction of the President and Directors that said stock has not been assigned or pledged, and to indemnify this Company against all claims, losses, damages, costs, charges and expenses that may accrue in consequence of issuing such new certificates.

ARTICLE VIII.—*Examination of Records.*

SECTION 1. No examination of the books or records of this Company shall be made by any person or persons who intend to use the information thus acquired to harass or vex the corporation, or to

enable him or them to improperly litigate with or against its interest, or to publish abroad such information against the will of its Board of Directors, or in any other manner to use such information to the detriment of the interests of the corporation.

No examination of the records or books of this corporation shall take place unless in the presence of the President and Secre-
52 tary, or Assistant Secretary, and in the office of the Company.

No person shall be permitted to examine the books and records of this corporation who has not been a holder of its stock and appearing upon the stock-book as such for at least six months prior to an application for permission to make such examination.

No person, not a stockholder in this corporation, shall be permitted to examine its books or records.

No statements as to the condition of this corporation, its business, or from its books, shall be furnished to any one unless the same has been previously examined and approved by the President, and he shall permit the same to be published.

SEC. 2. Should any person desire to examine any portion of the books or records of this corporation, he shall give to the President three days' notice thereof in writing, stating therein specifically the only purpose to be accomplished by such examination, and also the particular books or records he desires to examine, and the day and hour he, if permitted, will appear at the office of the Company to make such examination; and upon the receipt of such notice by the President, if he shall be satisfied that such person desires such examination for a purpose not inconsistent with the rules and by-laws of the corporation, he shall, in writing, notify the person desiring to make the examination, of the time when such examination can be made. Should the President, upon receiving such notice, deem it for the interests of the corporation that such application should be referred to the Board of Directors to act on the same, he shall, within ten days after receiving the same, so notify the person giving the same, in writing; and should the said person desire the action
53 of the Board of Directors upon his application, he shall, within five days after being so notified by the President, notify him in writing, that he desires the action of the Board of Directors upon his said application. But should he not, within said time so notify the President, then his application shall be considered and treated as withdrawn.

Upon receiving the notice above mentioned that the applicant desires, upon his application, the action of the Board of Directors, as aforesaid, it shall be the duty of the President to call a meeting of the Board of Directors to meet within ten days thereafter, and when said Board convenes the President shall lay said application before them for action thereon, and the President shall in writing, within three days thereafter, notify said person of the action of the Board upon his application.

ARTICLE IX.—*Sinking Fund.*

A sinking fund is hereby established for the purpose of paying off the bonded debt of the Company, into which shall be turned annually at least—dollars of the net earnings of the corporation, and such fund shall be disbursed or invested as the Board of Directors may deem best; and with said fund bonds overdue may be paid, or bonds not due may be purchased, as the Board may from time to time direct, at either a general or special meeting, or said fund may be invested in such manner as the Board may determine.

ARTICLE X.—*Rules of Order.*

SECTION 1. Any member may require the yeas and nays upon any question pending before the Board.

SEC. 2. No motion shall be acted upon until the same shall be seconded, and any Director offering a motion shall, if re-
54 quired by the President or any Director, reduce the same to writing.

SEC. 3. The order of business shall be as follows:

1. Roll-call.
2. Reading of minutes of previous meeting.
3. Report of Assistant Secretary.
4. Reports of committees.
5. Unfinished business..
6. New and miscellaneous business.
7. Adjournment.

ARTICLE XI.—*Amendments.*

Amendments or alterations to these By Laws may be made by a vote of the majority of the whole Board, the amendments or alterations proposed having been reduced in substance to writing and presented to the Board at least thirty days previous to the date of their adoption.

All former by-laws inconsistent herewith be, and the same are hereby, repealed.

Adopted April 14, 1884.

Filed Aug. 24, 1904.
W. G. CHAPMAN, *U. S. Clerk.*

55 Exhibit "B" filed with the foregoing petition is as follows, to-wit:—

Report of the Covington and Cincinnati Bridge Company, Covington, Kentucky, to the Auditor of Public Accounts of Kentucky, September 15, 1902.

ARTICLE III.

Assessment of Certain Corporations.

SEC. 1. Every railway Company or Corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, and also every other corporation, company or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The place or places where such local taxes are to be paid, and how apportioned, where more than one jurisdiction is entitled to share of such tax, shall be determined by the Auditor, Treasurer and Secretary
56 of State, who are hereby constituted a Board of Valuation and Assessment for said purpose, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said board, and shall convene the same from time to time as the business of the board may require.

SEC. 2. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies, whose statements shall be filed as hereinafter required by section 16 of this article, shall annually, between the fifteenth day of September and the first day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the Auditor may prescribe, showing the following facts, viz.:

Name of corporation: Covington and Cincinnati Bridge Co.

Name of the principal place of business of the corporation, company or association you represent: Covington, Ky.

Give the name and official position of the officer making this report.

Name: Bradford Shinkle. Position: President.

The kind of business in which the said corporation, company or association is engaged—Operating a bridge between Covington and Cincinnati for stock, foot passengers and vehicles.

The amount of capital stock, preferred and common, of the said corporation, company or association, as of date September 15, 1902.

Preferred, $750,000; Common, $313,700.

57 Number of shares, preferred and common, composing the capital stock of the said corporation, company or association on September 15, 1902.

Preferred, 7500; Common, 3137.

Amount of capital stock, as above, paid up, $1,063,700.00.

Par value of the preferred stock, as above, $750,000.00.

Par value of the common stock, as above, $313,700.00.

Real value of the stock, as above, Preferred, $750,000.00; Common, $ Nothing.

Highest price at which the stock above mentioned was sold at a *bona fide* sale within twelve months next before September 15, 1902.

$104.75 per share.

Amount of surplus fund and undivided profits, and the value of all other assets of the said corporation, company or association, on September 15, 1902.

Surplus fund, $—; Undivided profits, $—; Value of all other assets, $—.

State the total amount of indebtedness, as principal, of the said corporation, company or association on September, 15, 1902.

Bonded indebtedness, $540,000.00; Rate of interest paid 4 per cent.

Other indebtedness, $1000.00; Amount of interest paid, $22,000.00.

Total indebtedness, $541,000.00.

State separately the total amount of gross and net earnings, or income of the said corporation, company or association, including interest on investments, and income from all other sources for twelve months next before September 15, 1902.

Gross earnings or income Kentucky, $58373.44.

58 *Less Expenses.*

Salaries, ½	$2,350.00
Wages, ½	$4,538.59
Interest, ½	$11,000.00
Dividends, ½	$14,907.00
Enlargement of plant, ½	$292.70
Other expenses, ½	$3,624.69
Taxes Kentucky	9,509.39
Total	$46,222.37
Net income	$12,151.07

Amount and kind of tangible property in this State owned by the said corporation, company or association, on September, 15, 1902.

Amount of tangible property, $—— Unknown.

Kind of tangible property —— Lots 26 & 27 W ½ Lots 49 50 Lot 51 E ½ Lot 52.

State where the tangible property aforesaid is situated, assessed or liable to assessment.

County Kenton; City Covington.

Town —; number or name of taxing district or precinct —.

State the fair cash value of said tangible property, at the price it would bring at a fair voluntary sale.

$— unknown.

State the total length of the entire line or lines operated, owned, leased or controlled in this State by the said corporation, company or association. 1604 ft.

Specify in detail the entire length of the line or lines operated, owned leased or controlled, as above, in each county, city town and taxing district in this State. (Give the length of line in each county, city, town or taxing district separately.)

— 600 Ft. Covington.

— 1004 Ft. Kenton, Co. outside of Covington.

Also the total length of the entire line or lines, as above, operated, owned, leased or controlled, as above, elsewhere than in this State.

1116 Ft. Cincinnati, Ohio.

59 State the entire gross and net income or earnings received by the said corporation, company or association, in this State and out of this State, on business done in this State for twelve months next before September 15, 1902.

Gross income, $58373.44; Net income or earnings, $12151.07.

State the entire gross and net income or earnings received by the said corporation, company, or association, on business done in this State and elsewhere for the same length of time.

Gross income, $123,042.83; Net income or earnings, $35,670.42.

Expenses, $87,372.41.

COMMONWEALTH OF KENTUCKY, —— *County, ss:*

This day personally appeared before the undersigned, a — in and for the State and county aforesaid, —— —— whose signature is attached thereto, and made oath that the statements made in answer to the above interrogatories are true to the best of his knowledge and belief.

Given under my hand this — day of —— 190–.

Endorsements: Exhibit "B" Filed Aug. 24, 1904, W. C. Chapman, U. S. Clerk.

60 Exhibit "C" filed with the foregoing petition is as follows, to-wit:—

STATE OF KENTUCKY:

OFFICE AUDITOR OF PUBLIC ACCOUNTS,
FRANKFORT, *June 22nd,* 1903.

Bradford Shinkle Pres. Covington Ky.

DEAR SIR: Replying to your letter of the 20th, inst. asking for method used by this Board in arriving at the valuation placed upon the franchise of your company for the taxes of 1903, I beg to submit the following:

Net Income.....	$35,670.	
Interest	22,000.	
Dividends	29,814.	
Enlargement	584.	
6 per cent....	88,068	
	1,467,800	
	59	per cent. in Ky.
	13210200	
	7339000	
	866,002.00	Valuation in Kentucky.

Should you desire the Board will be pleased to hear you Wednesday of this week,

Very truly, POLK LAFFOON, JR., *Secretary.*

STATE OF KENRUCKY:

OFFICE OF AUDITOR OF PUBLIC ACCOUNTS,
FRANKFORT, KY., *Jun.* 18, 1903.

To Covington and Cincinnati Bridge Co., Covington, Ky.

You are hereby notified that the State Board of Valuati-n and Assessment, after due consideration of the report made to the
61 Auditor September 15, 1902 has fixed the value of your franchise as follows, to-wit:

Capital	$
Surplus	$
Undivided Profits	$
All Other Assets	$
Total Capital	$.866002.
Less Tangible Property, Etc	$590000
Franchise	$276002.
Tax	$1,380.01.

Under the law you will have thirty days to be heard on the subject of this valuation by the Board.

Yours truly, GUS G. COULTER, *Auditor.*

Final Notice.

STATE OF KENRUCKY:

OFFICE OF AUDITOR OF PUBLIC ACCOUNTS,
FRANKFORT, *Jan.* 2, 1904.

To Covington and Cincinnati Bridge Co., Covington, Ky.

The State Board of Valuation and Assessment have had the report of the above Corporation for September 15th, 1902, under considera-

tion and the 30 days' time in which to review the same having expired, have finally assessed the value of your Franchise as follows:

Capital Stock	$866,002.
Less Amount of Tangible Property Assessed by Assessor for State Taxes	400,000
Value of Franchise	$466,002.
Tax at 5 cents on each $100	$2,330.01.

Under the law you will have Thirty days to make payment
62 to this office, after which time, unless paid, the penalty fixed by law will have to be enforced.

Yours truly, GUS G. COULTER, *Auditor.*

Endorsed: "C." Filed Aug. 24, 1904, W. G. Chapman, U. S. Clerk.

63 On the same day to-wit, on the 24th day of Aug. 1904, the Clerk issued summons on the foregoing petition as follows, to-wit:—

The President of the United States of America to the Marshal of Eastern Kentucky District, Greeting:

You are commanded to summon S. W. Hager, Auditor of Public Accounts of the Commonwealth of Kentucky, to answer on the first day of the next September Term of the Circuit Court of the United States, for the Eastern District of Kentucky, to be held at the city of Frankfort on September 26th, 1904, a petition filed against him in said Court by The Covington & Cincinnati Bridge Company and warn him that upon his failure to answer, the petition will be taken for confessed, or he will be proceeded against for contempt, and you will make due return of this summons on the first day of the next September Term of said Court.

Witness, Melville W. Fuller, Esq., Chief Justice of the Supreme Court of the United States, at Frankfort, in
[SEAL.] the said District, this 24th day of August in the year of our Lord 1904, and of our Independence the 129th year.

WALTER G. CHAPMAN, *Clerk,*
By E. H. COLEMAN, *D. C.*

The Marshal's return on the foregoing summons is in words and figures as follows, viz:—Rec'd at Frankfort, Ky. Aug. 26th, 1904. Executed Same at Frankfort, Ky. by delivering a true copy of the within to S. W. Hager, Auditor of Public Accounts of the Commonwealth of Ky. Aug. 26–1904.

S. G. SHARP, *U. S. M.,*
By N. I. McDANIELS, *D. M.*

Clerk's endorsement: Returned and filed Aug. 29, 1904 W. G. Chapman, clerk.

64 On a day following, to-wit, on the 26th day of September, A. D., 1904, an order was made and entered in said cause, which order is in words and figures as follows, to-wit:

COVINGTON & CINCINNATI BRIDGE CO.
vs.
S. W. HAGER, Auditor.

Came the defendant, S. W. Hager, Auditor, by N. B. Hays, Esq., Attorney General for the Commonwealth of Kentucky, and filed his special demurrer to the plaintiff's petition herein; and the said defendant, without waiving his special demurrer, also filed a general demurrer to the petition.

65 The special demurrer referred to in the foregoing order is as follows, to-wit:

United States Circuit Court for the Eastern District of Kentucky, at Frankfort.

THE COVINGTON & CINCINNATI BRIDGE CO., Plaintiff,
vs.
S. W. HAGER, Auditor of Public Accounts of Kentucky, Defendant.

Special Demurrer.

The defendant S. W. Hager Auditor of public accounts of Kentucky, demurrers specially to the Jurisdiction of this court.

1st. Because this is in effect an action against the Commonwealth of Kentucky; 2nd. Because the Plaintiff and Defendant are both citizens and residents of the Commonwealth of Kentucky; 3rd. Because the amount in controversy or in dispute is less than Two thousand dollars exclusive of interest and costs. Wherefore Defendant prays the judgment of the court whether he ought to be compelled to put in any further answer to the petition herein.

S. W. HAGER.

The affiant and Defendant S. W. Hager Auditor aforesaid, says that the foregoing Special Demurrers are not imposed for delay.

S. W. HAGER.

Subscribed and sworn to before me by S. W. Hager, this Sept. 26, 1904.

[SEAL.] CHAS. E. BOOE,
Notary Public.

My commission expires Jan. 5th, 1908.

The undersigned counsel for defendant S. W. Hager Auditor, says that in his opinion the special demurrers filed by the defendant Hager to the plaintiff's petition are well founded in point of law.

N. B. HAYS,
Att'y General.

Filed Sept. 26, 1904.

W. G. CHAPMAN, *U. S. Clerk.*

66 General Demurrer referred to in the foregoing order, is as follows, to-wit:

United States Circuit Court for the Eastern District of Kentucky, at Frankfort.

THE COVINGTON & CINCINNATI BRIDGE CO., Plaintiff,
vs.
S. W. HAGER, Auditor of Public Accounts of Kentucky, Defendant.

General Demurrer.

The defendant S. W. Hager Auditor of public accounts of Kentucky not waiving his special demurrers, files general demurrer to the petition of the plaintiff herein because it does not state facts sufficient to constitute a cause of action. Wherefore he prays the judgment of the court whether he be compelled to make further defense therein.

S. W. HAGER.

Subscribed and sworn to before me by S. W. Hager, this Sept., 26, 1904.

[SEAL.] CHAS. E. BOOE,
Notary Public.

My commission expires Jan. 5, 1908.

The undersigned counsel for defendant S. W. Hager, Auditor aforesaid, says that in his opinion the general demurrer interposed by the defendant herein, is well founded in point of law.

N. B. HAYS,
Att'y General.

Filed Sept. 26, 1904.

W. G. CHAPMAN, *U. S. Clerk.*

67 On March 7th, 1905, the Court filed its written opinion which is as follows, to-wit:

United States Circuit Court, Eastern District of Kentucky.

THE COVINGTON & CINCINNATI BRIDGE COMPANY, Plaintiff,
vs.
S. W. HAGER, Auditor, &c., Defendant.

The defendant has filed a general and special demurrer to the bill. I do not find it necessary to consider and determine all the questions raised thereby. It is sufficient for me to say that I do not think that the tax complained of violates the commerce clause of the federal constitution. It is not a tax on the business of the plaintiff, but on its property, to-wit, that portion of its intangible property in Kentucky; and that, not because it is used in interstate commerce. The

question seems to be foreclosed by the decision of the Supreme Court of the United States in the case of Adams Express Co. *v.* Kentucky, 166 U. S. 172.

In the case of Atlantic &c. Tel. Co. *v.* Philadelphia, 190 U. S. 163, Mr. Justice Brewer said:

"The franchise of a corporation, although that franchise is the business of interstate commerce, is a part of its property subject to taxation, providing at least the franchise is not received from the United States."

The general demurrer is, therefore, sustained and the bill dismissed at plaintiff's costs.

A. M. J. COCHRAN, *Judge.*

Mar. 7, 1905.

Clerk's endorsement: Filed March 7, 1905, W. G. Chapman, U. S. Clerk.

68 On a subsequent date, to-wit, on March 13th, 1905, judgment was entered in said cause as follows, to-wit:

United States Circuit Court, Eastern District of Kentucky.

THE COVINGTON AND CINCINNATI BRIDGE COMPANY, Plaintiff,
vs.
S. W. HAGER, Auditor, Defendant.

Judgment.

This cause having been submitted on a special and general demurrer to the petition and the exhibits therewith filed and the Court being sufficiently advised, the general demurrer is sustained, to which ruling the Plaintiff objects and excepts, and the Plaintiff declining to plead further, it is now ordered and adjudged that the petition be and the same is now dismissed and that the Defendant shall recover from Plaintiff its costs herein expended. To which judgment the Plaintiff excepts.

69 On the same date, to-wit, on March 13th, 1905, plaintiff filed its petition for writ of error, which is as follows, to-wit:

United States Circuit Court, Eastern District of Kentucky, at Frankfort.

THE COVINGTON AND CINCINNATI BRIDGE COMPANY, Plaintiff,
vs.
S. W. HAGER, Auditor, Defendant.

Petition for Writ of Error.

The Plaintiff, The Covington and Cincinnati Bridge Company feeling itself aggrieved by the order and judgment herein, entered

this 13, day of March 1905, hereby tenders and files its assignment of errors and prays for a writ of error to the Supreme Court of the United States, and that the transcript of the proceedings and papers herein upon which said judgment was rendered be sent, duly attested to the Supreme Court of the United States.

THE COVINGTON AND CINCINNATI BRIDGE COMPANY,
By S. D. ROUSE, *Att'y.*

Filed Mar. 13, 1905.

W. G. CHAPMAN, *U. S. Clerk.*

70 On March 13th, 1905, plaintiff also filed its assignment of errors, which is as follows, to-wit:

United States Circuit Court, Eastern District of Kentucky, at Frankfort.

THE COVINGTON AND CINCINNATI BRIDGE COMPANY, Plaintiff,
vs.
S. W. HAGER, Auditor, Defendant.

Assignment of Errors.

The Plaintiff, the Covington and Cincinnati Bridge Company feeling itself aggrieved by the judgment entered herein this 13 day of March 1905, herewith files its assignment of errors, and says the Court erred I. In sustaining the demurrer to the petition, and II. Erred to the prejudice of Plaintiff in dismissing its petition.

And Plaintiff prays that its petition for a writ of error and assignment of errors be allowed and that the record be duly attested and forwarded to the Supreme Court of the Unied States.

THE COVINGTON AND CINCINNATI BRIDGE COMPANY,
By S. D. ROUSE, *Att'y.*

Filed Mar. 13, 1905.

W. G. CHAPMAN, *U. S. Clerk.*

71 On March 13th, 1905, plaintiff also filed its bond on writ of error, which is as follows, to-wit:

United States Circuit Court, Eastern District of Kentucky.

THE COVINGTON AND CINCINNATI BRIDGE COMPANY, Plaintiff,
vs.
S. W. HAGER, Auditor, Defendant.

Bond.

Know all men by these presents that The Covington and Cincinnati Bridge Company Principal and S. D. Rouse surety are held

and firmly bound unto S. W. Hager, Auditor in the full and just sum of $500, to be paid to the said S. W. Hager Auditor, his Attorney, successor or assigns to which payment we do well and truly bind ourselves our heirs, successors, administrators, executors, jointly and severally by these presents.

Given under our hands this 13th March, 1905.

Whereas the said S. W. Hager, Auditor has this day obtained a judgment in the United States Circuit Court between said Hager, Auditor, Defendant and The Covington and Cincinnati Bridge Company, Plaintiff, dismissing the said Bridge Company's action, and the Bridge Company has filed a petition for a writ of error in the aforesaid suit, to the Supreme Court of the United States.

Now the Condition of the above obligation is such that if the said The Covington and Cincinnati Bridge Company shall prosecute said writ of error to effect and answer all costs and damages if he fail to make this plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

THE COVINGTON AND CINCINNATI
BRIDGE COMPANY,
By S. D. ROUSE, *Att'y.*
S. D. ROUSE.

Attest:
W. G. CHAPMAN, *Clerk.*
per E. H. COLEMAN, *Deputy Clerk.*
Approved:
A. M. J. COCHRAN, *Judge.*

Filed Mar. 13, 1905.

W. G. CHAPMAN, *Clerk.*

72 THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, Set.

I, Walter C. Chapman, Clerk of the Circuit Court of the United States for the Sixth Circuit and Eastern District of Kentucky, at Frankfort, by virtue of the Writ of Error hereto attached, and in obedience thereto, do hereby certify that the foregoing typewritten pages, numbered from 1 to 71 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of The Covington & Cincinnati Bridge Company *vs.* S. W. Hager, Auditor of Public Accounts of the Commonwealth of Kentucky, as the same remain of record and on file in my office aforesaid.

In testimony whereof, I have hereunto set my hand as clerk of the aforesaid Court and affixed the official seal thereof, at the city of Frankfort, this the 25th day of April A. D. 1905, and of the Independence of the United States the 129th year.

[Seal 6th Circuit Court, Eastern Ky. Dis.
U. S. of America.]

WALTER G. CHAPMAN, Clerk.

73 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Sixth Circuit and Eastern District of Kentucky, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, between The Covington and Cincinnati Bridge Company, plaintiff, and S. W. Hager, Auditor of Public Accounts of the Commonwealth of Kentucky, defendant, a manifest error has happened, to the great damage of the said The Covington and Cincinnati Bridge Company, as by its complaint appears. We being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the 6th day of May next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the 7th day of April A. D. 1905, and of the independence of the United States the 129th year.

[Seal 6th Circuit Court, Eastern Ky. Dis. U. S. of America.]

WALTER G. CHAPMAN,
Clerk of the United States Circuit Court for the Eastern District of Kentucky, at Frankfort.

Allowed by
A. M. J. COCHRAN, *District Judge.*

[Endorsed:] Covington & Cincinnati Bridge Company, Plaintiff in Error, *vs.* S. W. Hager, Auditor of Public Accounts of Com'lth of Ky., Defendant in Error. Writ of Error.

74 UNITED STATES OF AMERICA, *ss:*

To S. W. Hager, Auditor of Public Accounts of the Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Circuit Court of the United States for the Sixth Circuit and Eastern District of Kentucky, at Frankfort, wherein The Covington and Cincinnati Bridge Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judg-

ment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the City of Frankfort, in the Circuit and District above named, this the 7th day of April A. D., 1905, and of the Independence of the United States the 129th year.

[Seal 6th Circuit Court, Eastern Ky. Dis.
U. S. of America.]

A. M. J. COCHRAN,
Judge of the United States District Court
for the Eastern District of Kentucky.

75 [Endorsed:] Covington & Cincinnati Bridge Company, Plaintiff in Error, *vs.* S. W. Hager, Auditor of Public Accts. of Com'lth of Ky., Def't in Error. Citation.

Rec'd at Frankfort, Ky., April 21, 1905. Executed same by delivering a true copy of same to S. W. Hager, Auditor for the State of Ky., April 22, 1905.

S. G. SHARP, *U. S. M.*,
By N. I. McDANIEL, *D. M.*

Fee, $2.00

Endorsed on cover: File No. 19,790. E. Kentucky C. C. U. S. Term No. 288. The Covington & Cincinnati Bridge Company, Plaintiff in Error, *vs.* S. W. Hager, Auditor of Public Accounts of the Commonwealth of Kentucky. Filed June 7th, 1905. File No. 19,790.

No. 37.

Supreme Court of the United States

Supreme Court U. S.
FILED
OCT 13 1906
JAMES H. MCKENNEY,
Clerk.

THE COVINGTON & CINCINNATI BRIDGE CO.,
Plaintiff in Error,

vs.

S. W. HAGER, *Auditor of Public Accounts of the State of Kentucky,*
Defendant in Error.

Brief for Plaintiff in Error

SHELLEY D. ROUSE,
CHARLTON B. THOMPSON,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES

THE COVINGTON & CINCINNATI BRIDGE CO.,
Plaintiff in Error,

vs.

S. W. HAGER, *Auditor of Public Accounts of the State of Kentucky,*
Defendant in Error.

Brief for Plaintiff in Error.

STATEMENT.

This is an action in *mandamus* filed in the Circuit Court against the Auditor of Public Accounts of Kentucky. Its object is to compel him to issue his warrant on the State Treasury for the amount of the franchise tax exacted of the plaintiff in error under color of Sections 4079 and 4080 of the Kentucky Statutes. The tax, which amounted to two thousand three hundred and thirty dollars and one cent ($2,330.01) was paid under protest. The ground of the protest and the ground of this action is that the tax is repugnant to the Inter-state Commerce clause of the Federal Constitution. The basis of the argument is that the franchise tax, as imposed, is a direct burden on the *business* of the bridge company. In effect it is nothing but a tax upon the *receipts* of the company, whose business consists exclusively of commerce between Kentucky and Ohio.

In addition to the chief question in the case there are two preliminary questions; first, whether this is a case in which the writ of mandamus can issue at all; and, sec-

ond, whether the payment sought to be recovered back was voluntary.

In the Circuit Court there were general and special demurrers to the petition. The court below sustained the general demurrer upon the ground that the tax did not violate the Commerce Clause of the Constitution.

SPECIFICATIONS OF ERRORS

The only error relied upon is the action of the Circuit Court in sustaining the general demurrer to the petition.

BRIEF OF ARGUMENT.

This action does not come within the prohibition of the Eleventh Amendment to the Federal Constitution, because it has been authorized by the State.

Kentucky Statutes, Section 162.

So far as pertinent, said act reads as follows:

> "Where it shall appear to the auditor that money has been paid into the treasury for taxes where no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same."

Bank v. *Stone, Auditor,* 22 Ky. Law Rep., 831.
Same v. *Same,* 108 Ky., 427.

The Circuit Court had jurisdiction of the action because of the subject-matter and the amount involved. The fact that alternative relief was sought in the sum of eight hundred and sixty-two dollars and sixty-six cents ($862.66), *could not defeat jurisdiction if a case was stated for the full relief asked. Utile per inutile haud vitiatur.*

Record, page 4.
U. S. Compiled Statutes, Section 629.
Cohens v. *Virginia,* 6 Wheaton, 264.

There was no way in which the lower Court could enforce its jurisdiction except by a writ of mandamus because:

I. Jurisdiction could not be entertained in a direct suit to recover the money, and so no judgment could have been recovered.

Amendment 11, Constitution of the United States.
Coulter v. *Weir*, 127 Fed. R., 897.

II. The collection of the tax would not be enjoined by a federal court purely because of its unconstitutionality, in the absence of a distinct equity.

Arkansas Bldg. Association v. *Madden*, 175 U. S., 269.
Pittsburg Rwy. v. *Board of Public Works*, 172 U. S., 32.

A writ of mandamus may be issued by a federal court wherever necessary to enforce its jurisdiction.

U. S. Compiled Statutes, Section 716.
Barber Asphalt Co. v. *Morris, Judge*, 132 Fed. R., 945.
Bath County v. *Amy*, 13 Wall., 244.
Rosenbaum v. *Bower*, 120 U. S., 450.
Graham v. *Norton*, 15 Wall., 166.
Davis v. *Corbin*, 112 U. S., 36.
Riggs v. *Johnson County*, 6 Wall., 166.
Heine v. *Levee Com.*, 19 Wall., 655.
Louisiana v. *Jumel*, 107 U. S., 711.
Davenport v. *City of Dodge*, 105 U. S., 237.
Curtis on Jurisdiction of U. S. Courts, p. 168.

An assessment paid under protest in order to avoid severe penalties is not voluntary, even where made by a quasi public corporation, entitled to its day in court.

Record, page 6.
Section 4091, Kentucky Statutes.

"*Section* 4091. TAXES OF CORPORATIONS AND SIMILAR CONCERNS—EXCEPT BANKS AND TRUST COMPANIES—WHEN DUE—PENALTIES. All State taxes assessed against any corporation, company or association under this article, except banks and trust companies, shall be due and payable thirty days after notice of the same has been given said corporation, company or association by the auditor; and all county, municipal, school and other taxes shall be due and payable thirty days after notice of the amount of said tax is given by the officer, whose duty it is to collect the same, and every such corporation, company or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum; any such corporation, company or association failing to pay its taxes, penalty and interest, after becoming delinquent shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction."

Erskine v. *Van Arsdale*, 15 Wall., 75.
Robertson v. *Frank Bros.*, 132 U. S., 17.
Swift v. *U. S.*, 11 U. S., 22, 28.
Ratterman v. *Express Co.*, 49 O. S., 608.
Baker v. *Cincinnati*, 11 O. St., 534.
Baker v. *Panola County*, 30 Tex., 86.
City of Marshall v. *Sneidiker*, 25 Tex., 460.
Gas Company v. *Galveston County*, 54 Tex., 280.
Cooley on Taxation (3d Ed.), p. 1506.
Louisville v. *Anderson*, 79 Ky., 334.
L. & N. R. R. Co. v. *Hopkins Co.*, 87 Ky., 605.
L. & N. R. R. Co. v. *Commonwealth*, 89 Ky., 531.

The business of the Covington & Cincinnati Bridge Co. consists exclusively of Inter-state Commerce.

Cov. & Cinti. Bridge Co. v. *Kentucky*, 154 U. S., 204.

The tax imposed by the State Board of Valuation and Assessment is a direct burden on the business of the Company, and is substantially a tax upon its net receipts; and hence repugnant to Clause 3, *Section* 8, *Article I. of the Constitution of the United States.*

Pages 3, 4, 5, Record.

Sections 4077, 4078, 4079, 4080, Kentucky Statutes.

"*Section* 4077. FRANCHISE TAX IN ADDITION TO OTHER TAX—BOARD OF VALUATION—CHAIRMAN AND DUTIES. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the County, incorporated city, town and taxing district, where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are hereby constituted a Board of Valuation and Assessment, for fixing the value of said franchise, except as to turnpike companies, which are provided for in Section 4095 of this article, the place or places where such local taxes are to be paid by other corporation on their franchise, and how appor-

tioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require. (Assessment of franchises in first and second-class cities, Sec. 2984*a*.)

"*Section* 4078. CORPORATIONS TO REPORT CERTAIN FACTS TO AUDITOR TO DETERMINE VALUE OF FRANCHISE. In order to determine the value of the franchises mentioned in the next preceding section, except banks and trust companies whose statements shall be filed as hereinafter required by Section 4092, of this article, shall annually, between the fifteenth day of September and first day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the Auditor may prescribe, showing the following facts, viz.: The name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which stock was sold at a *bona fide* sale within twelve months next before the fifteenth day of September of the year in which the statement is required to be made; the amount of surplus and undivided profits and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the

price it would bring at a fair voluntary sale, and such other facts as the Auditor may require. (Assessment of franchise in first and second-class cities, Sec. 2984*a*.)

"*Section* 4079. REPORTS BY CORPORATIONS WHOSE LINES EXTEND BEYOND STATE OR COUNTY —VALUE OF FRANCHISE—HOW DETERMINED. Where the line or lines of any such corporation, company or association extend beyond the limits of the State or County, the statement shall, in addition to the other facts hereinbefore required, show the length of the entire line operated, owned, leased or controlled in this State, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company or association be organized under the laws of any other State or government, or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts, in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the fifteenth day of September of the year in which the assessment is required to be made. In cases where any of the facts required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchise to be taxed, the said board may excuse the officer from answering such questions: *Provided*, that said board, from said statement, and from such other evidence, as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property

assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid. (Assessment of franchises in first and second-class cities, Sec. 2984*a*.)

"*Section* 4080. FOREIGN CORPORATIONS—VALUE OF FRANCHISE—HOW DETERMINED. If the corporation, company, or association be organized under the laws of any other State or government, except as provided in the next section, the board shall fix the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company or association in this State and elsewhere, the proportion which the gross receipts in this State, within twelve months next before the fifteenth day of September of the year in which the assessment was made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock, less the assessed value of the tangible property assessed, or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this State. (Assessment of franchises in first and second class cities, Sec. 2984*a*.)"

Ratterman v. *W. U. Telegraph Co.*, 127 U. S., 411.
Philadelphia Steamship Co. v. *Penn.*, 122 U. S., 326.

Notwithstanding the form or the name of a tax it will be held invalid if it falls ultimately upon the business of an inter-state commerce concern.

Case of the State Freight Tax, 15 Wall., 232.
Postal Telegraph Cable Co. v. *Adams*, 155 U. S., 683.
Mass v. *Telegraph Co.*, 141 U. S., 40.

There is a difference between a tax on the franchise to exist and a tax on the franchise to do business; and when

the tax falls on the business, it is void if that business consists of Inter-state Commerce.

Henderson Bridge Co. v. *Kentucky,* 166 U. S., 150.
Keokuk Bridge Co. v. *Illinois,* 175 U. S., 626.
Adams Express Co. v. *Ohio,* 165 U. S., 194; 166 U. S., 185.
Phila. Steamship Co. v. *Penn.,* 122 U. S., 326.
Gloucester Ferry Co. v. *Penn.,* 114 U. S., 196.

A State tax levied for the privilege or license to carry on Inter-state or foreign commerce is unconstitutional.

Brown v. *Maryland,* 12 Wheaton, 419.
Leloup v. *Port of Mobile,* 127 U. S., 640.
Welton v. *Missouri,* 91 U. S., 275.
Robbins v. *Shelby County Taxing District,* 120 U. S., 489.
Brennan v. *Titusville,* 153 U. S., 289.
Crutcher v. *Kentucky,* 147 U. S., 47.

ARGUMENT.

Whether or not this is an action against the State of Kentucky need not be considered. The State itself has authorized this proceeding. Section 162 of the Statutes, cited above, has been construed by the Court of Appeals of Kentucky as authorizing an action in *mandamus* against the Auditor, where he improperly refuses to issue his warrant on the Treasury. *Bank* v. *Stone, Auditor,* 22 Ky. L. Rep., 831; *Same* v. *Same,* 108 Ky., 427. The petition alleges a demand on the Auditor and his refusal. (Record, p. 6.) So there can be no obstacle to the maintenance of this action on the ground that the State is a party, or on any ground of local procedure.

The plaintiff below did not rely upon diversity of citizenship to confer jurisdiction on the Circuit Court. The fact that the Bridge Company was incorporated in Ohio,

as well as in Kentucky, was set out in the petition by way of inducement only. Jurisdiction attached because of the subject-matter of the suit. The right sought to be enforced arises under the Constitution of the United States. Compiled Statutes, Section 629. As to suits arising under the Federal Constitution or a federal law, the rule was thus laid down by Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wh., 264:

> "A case in law or equity consists of the right of the one party as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on either."

The decision of this case on its merits depends upon a clause of the Constitution. It was upon this clause that the lower court rendered its decision (Record, p. 38). There is no doubt of the jurisdiction of this court to decide the merits of this case on this writ of error, for there was no decision on jurisdiction below. Section 672, Compiled Statutes. And, of course, there was no certificate on this point from the Circuit Court.

The petition shows on its face that the amount involved is two thousand and three hundred and thirty dollars and one cent ($2,330.01). This is sufficient to give jurisdiction to the Circuit Court, even though alternative relief is sought in the amount of eight hundred and sixty-two dollars and sixty-six cents ($862.66) only. If a good case is made out, the addition of something else, not good, can not affect the case on its merits. *Utile per inutile haud vitiatur.* But because of the insufficiency of the amount, the ground on which the alternative relief was sought was abandoned early in the case. It has been conceded throughout the argument that unless the plaintiff in error is entitled to recover the full amount sued for, it is entitled to recover nothing.

MANDAMUS IS NECESSARY TO ENFORCE THE JURISDICTION OF THE CIRCUIT COURT.

The Circuit Court could issue the writ of mandamus only if it was necessary to carry into effect the jurisdiction of the court. In Kentucky this writ is no longer a high prerogative writ, but one granted in an ordinary civil proceeding. Code, Section 174 and notes. Under the Act conforming the federal procedure to that of the various states, it might be inferred that this writ should issue whenever it would be proper under the State practice, and the federal court had jurisdiction of the case. But, of course, it is conceded that such is not the law. It has been settled otherwise by numerous decisions of the Supreme Court. It is held that this writ, being of an extraordinary character, is not authorized by the general language of Section 629, of the Compiled Statutes. So the mere fact that it might be an *appropriate* remedy in a case whose subject matter is embraced in Section 629 is not sufficient. The power of the circuit courts to issue writs of mandamus is measured by Section 716 of the Compiled Statutes, which reads:

> "The Supreme Court and the Circuit and District courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by Statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Writs of mandamus, being nowhere specifically provided for, are included in this language. They can be issued by the Circuit Courts, but only where "necessary for the exercise of their respective jurisdictions." The difficulty lies in construing this phrase. It appears never to have been fully construed by the Supreme Court. But unless a very strained meaning is to be attached to the

word "necessary" the writ *is* necessary for the Circuit Court to exercise its jurisdiction in this case.

The common case where the writ has been invoked is where the object is to compel municipalities to levy taxes to pay their obligations. Where the claim involved has been reduced to judgment, the writ has been granted; and it has been denied where there has been no judgment. The reason assigned is that in the second case mandamus is not necessarily indispensable to the exercise of jurisdictions. A judgment might be recovered and satisfied. If not, then the writ will issue in a proper case as a means necessary to enforce the judgment. A leading case on the point is *Bath County* v. *Amy*, 13 Wall., 244. That case involved an act of the Kentucky Legislature, chartering the Lexington & Big Sandy Railroad Co. The act authorized the county courts of the counties through which the road ran to subscribe for stock and pay for it with borrowed money. Under this provision Bath County subscribed for stock and issued bonds bearing interest coupons. A special tax was levied in this behalf, and interest was paid for five years. The county court then refused to pay further. Amy, a citizen of New York, who held a number of bonds with overdue coupons, filed suit in the Circuit Court, praying for a writ of *mandamus* compelling the county court justices to levy the tax and pay the interest. The writ was granted, and the case was carried to the Supreme Court, where judgment was reversed. The court held that the general language of the Judiciary Act did not warrant the writ, because at the date of its passage—1789—*mandamus* was a high prerogative writ, issuing only in the King's name, from the Court of King's Bench. Furthermore, the enactment of what is now Section 716 of the Compiled Statutes, showed conclusively that Congress intended to allow the writ only in special cases. Here the claim of the relator had not been reduced to judgment in the Circuit Court, and so the appli-

cation was an original proceeding, neither necessary nor ancillary to any jurisdiction the court then had.

This case differs in an important particular from the case at bar. In the case cited, the plaintiff could have proceeded to obtain judgment. This might have been all that was necessary. At any rate, until this was done *mandamus* was not necessary to enforce jurisdiction. But in the present case there is no way in which the Bridge Company could reduce its claim to judgment. An action to recover the money, though brought nominally against the Auditor, would be an action against the State, under the rule laid down in *Coulter* v. *Weir*, 127 Fed. R., 897. For, although by Section 162 of the Kentucky Statutes, the State has authorized a proceeding of this character, it has not consented to be sued in other actions. Now, the plaintiff in error has set up a federal right of which the federal courts can take cognizance. This federal, constitutional right can be enforced only by compelling the Auditor to issue his warrant under the statute. Is this, then, not one of the cases, within Section 716, where *mandamus* is necessary to enforce the jurisdiction of the court?

In *Bath County* v. *Amy*, no real federal right was involved. Jurisdiction attached only because of diversity of citizenship. That some importance is to be attached to the fact that it is a distinct federal right which is now sought to be enforced, appears from the language of the court in *Rosenbaum* v. *Bower*, 120 U. S., 450. The suit was filed by a non-resident bondholder to mandamus the Treasurer of San Francisco to redeem certain bonds and pay the interest coupons. The judgment denying the writ was affirmed by the Supreme Court. The writ was not ancillary to any other proceeding or necessary to enforce jurisdiction. There was no obstacle to the recovery of a judgment. *Bath County* v. *Amy* was approved and followed. Speaking of the diversity of citizenship, the court said:

> "The only possible ground of jurisdiction in the present case is diversity of citizenship; for the right of action claimed does not arise under the Constitution, or a law or a treaty of the United States. It exists, if at all, under a statute of a State. The State is not alleged to have passed any law impairing the obligation of any contract of which the plaintiff claims the benefit, or to have deprived him of any right secured him by the Constitution of the United States."

There was a strong dissent by Bradley, Matthews and Harlan, J.J., who took the position that *mandamus* was no longer a high prerogative writ, but an ordinary civil proceeding, and so within Section 629 of the Statutes. So weighty a dissent should have influence in a case which involves the possible extension of a highly technical doctrine.

In *Graham* v. *Norton*, 15 Wall., 427, the court held that the District Court was without authority to issue a writ of *mandamus* on behalf of an assignee in bankruptcy against a State Auditor to repay certain illegal taxes which the Legislature had declared should be refunded. The reason given in the opinion was that the writ was asked for in an original proceeding. It does not appear in the report that there was no other way to get relief in this particular case. Unless the statement in the opinion that the writ can never be issued as an original writ, is to be qualified, then this action will not lie. Mr. Justice Bradley concurred upon the ground that the case on its merits was not a proper one for *mandamus*. If the language of the opinion is to be read with the idea that there was another way for the lower court to exercise jurisdiction, then the case goes no further than *Bath County* v. *Amy*. The question is whether the writ must be both ancillary to another proceeding and necessary to enforce jurisdiction, or need be only necessary to enforce jurisdiction.

In *Riggs* v. *Johnson County*, 6 Wall., 166, a judgment of the Circuit Court granting the writ was affirmed. A judgment had already been recovered against the county, and an execution returned *nulla bona*. It was held that in such a case mandamus to levy a tax was a proper method to enforce the judgment. The writ was treated as being in the nature of an execution. On similar facts the same ruling was made in *Davis* v. *Corbin*, 112 U. S., 36. The same general rule was laid down in *Heine* v. *Levee Commissioners*, 19 Wall., 655; *Louisiana* v. *Jumel*, 107 U. S., 711; *Davenport* v. *City of Dodge*, 105 U. S., 237. No one of these cases involves the exact point now raised. The law on this point is thus summed up by Curtis in his "Jurisdiction of the United States Courts," at page 168:

> "If they (the Circuit Courts) have a case before them over which they have jurisdiction, and it is necessary to issue a writ of mandamus, in order to carry that jurisdiction into complete effect, they have power to issue the writ; but they have not the power to entertain the writ, so to speak, when this jurisdiction is founded on the writ itself."

The Circuit Court here clearly had jurisdiction over the subject-matter of this suit, and the only way to carry that jurisdiction into any effect whatever was by granting the writ prayed for.

No case has been found in which the Supreme Court has sustained the writ in the absence of a judgment. The question arises whether a judgment is absolutely a condition precedent to the granting of the writ, or whether it merely happened in the cases cited that, in the absence of judgments, the writ was not indispensable to enforce jurisdiction. The contention made is that where an undoubted jurisdiction of the subject-matter can not be otherwise enforced, the writ should issue as ancillary to that jurisdiction. This view is sustained by a late deci-

sion of the Circuit Court of Appeals—*Barber Asphalt Co.* v. *Morris, Judge,* 132 Fed. R., 945. The only similarity between that case and the case at bar lies in the fact that in both cases the federal court is asked to issue the writ in the absence of a previous judgment. In the case referred to, a suit was pending in the Circuit Court before Judge Morris. Jurisdiction attached only by reason of diverse citizenship. The precise question involved was also before the State Court, and, in deference to the State judiciary, Judge Morris made an order staying all further proceedings in his court until the State courts should decide the question. To compel the lower court to proceed with the case, one of the parties applied to the Circuit Court of Appeals. Judge Sanborn, in delivering the opinion of the court, said:

> "That order is not reviewable by writ of error or by appeal, and the Barber Co. applies to this court for its writ of mandamus to direct the judge holding the court below to proceed to the trial of the case."

The court held, in effect, that the question was whether or not the writ was necessary to enforce its own jurisdiction. For Section 12 of the act of March 3, 1891, creating the Circuit Court of Appeals, grants to that court the powers granted to the Circuit Courts by Section 716 of the Compiled Statutes. Appellate Courts can not mandamus inferior courts in cases not reviewable by appeal or writ of error. Jurisdiction is not to be created in that way. But the proposition was laid down that the question was, not whether appellate jurisdiction *had been* invoked, but whether it *might be* invoked. The case before the Circuit Court was reviewable by the Circuit Court of Appeals. So by arbitrarily refusing to proceed with the case, the circuit judge would deprive the higher court of its appellate jurisdiction. For there could be no appeal or writ of error before final judgment. So, although there was

no judgment, the court granted the writ, as a means of enforcing its own jurisdiction. The court said:

> "Few, indeed, are the cases in which appellate jurisdiction is regarded after the right to it has been actually exercised. But many cases arise in which the acts or orders of the inferior courts, unless corrected by writs of mandamus, prevent the exercise of appellate jurisdiction and destroy its effect before any final decision which may be challenged by appeal or writ of error has been reached."

And later, speaking of the case before it, the court said:

> "The order which stays the action until the final determination by the State courts of the questions it involves, prevents both the independent adjudication of those questions by the United States Circuit Court and the review of that adjudication by this court, and thus destroys, or greatly impairs, the appellate jurisdiction of this court in that case. The very purpose of the grant to this court of the power to issue the writ of mandamus was to enable it to protect and maintain this jurisdiction, and that grant not only conferred the power, but it necessarily imposed upon this court the duty to issue its writ of mandamus to impel the court below to proceed with all convenient speed to the trial and adjudication of the controversy between the citizens of different states in which its jurisdiction has been invoked, to the end that the appellate jurisdiction of this court over its action may be seasonably and effectually exercised."

The court continues:

> "This stay deprived the petitioner of its right to the independent judgment of the national courts upon the merits of its action, and destroys the jurisdiction of this court to review the adjudication which may be made upon it in the court below. Against this error the petitioner is

> remediless save by means of the writ of mandamus by this court."

In the case decided by Judge Sanborn not only was there no judgment upon which to base the writ, but the very absence of a final order was what rendered the writ necessary. In the case at bar the jurisdiction of the court is clearer than in the Barber case. It is a distinct federal question that is involved, not a question of diversity of citizenship. The only possible way to enforce this jurisdiction is by means of the writ prayed for. Unless a judgment is an indispensable preliminary, there is no reason, unless from the merits of the case, why the writ should not be granted.

It has already been pointed out that under a late decision by Judge Lurton no judgment for the money paid could have been recovered in this case. The only method of enforcing the repayment of the money from the State is by the method authorized by the State. It seems clear that the Circuit Court would not have had jurisdiction to enjoin the collection of the franchise tax. The only ground for such a suit would have been the unconstitutionality of the assessment. This would not be sufficient to bring the case within the jurisdiction of a court of equity. In *Arkansas Building Association* v. *Madden*, 175 U. S., 269, the Supreme Court held that the mere illegality of a State franchise tax was not sufficient ground for the Circuit Court to grant an injunction. Some distinct ground of equity jurisdiction must appear. The court said:

> "But the bill of complaint did not set forth any facts tending to show that complainant could not escape the forfeiture by payment of the two hundred and fifty ($250.00) dollars under protest, and recover back the money so paid if the law should be held void."

To the same effect is *Pittsburg, etc., Ry.* v. *Board of Public Works*, 172 U. S., 32. The court dismissed a bill

to enjoin the collection of an unconstitutional tax. No special ground of equitable jurisdiction was shown. Mr. Justice Gray, delivering the opinion of the court, said:

> "The collection of taxes assessed under authority of a State is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction."

The case of the plaintiff in error would not come under any head of equity jurisdiction. The usual bill of peace brought by carriers in tax cases where they run through various taxing districts, would not apply in this case. There was no question of irreparable injury, because the Bridge Company was perfectly solvent and able to pay the tax, however illegal, and depend upon recovering it back. The present course was chosen mainly on the strength of the two decisions just cited. If a writ of mandamus, apparently the only possible remedy, can not issue here, then it seems that in this case at least the court is without power to exercise and enforce its undoubted jurisdiction.

THE ASSESSMENT WAS PAID UNDER PROTEST AND IF ILLEGAL MAY BE RECOVERED BACK.

The petition alleges not only that the tax was paid under protest, but that it was later demanded back of the Auditor. (Record, p. 6.) The grounds of the objection were stated in the protest. It is alleged that the payment was made to avoid the penalties imposed by Section 4091 of the Kentucky Statutes. This statute not only imposes a penalty on delinquents of ten per cent. immediately, and ten per cent. per annum thereafter, but makes fail-

ure to pay within thirty days a misdemeanor, punishable by indictment. The penalty on conviction is a fine of fifty ($50.00) dollars a day. These circumstances are ample to remove this from the class of voluntary payments, notwithstanding that the tax was enforceable only by a judicial proceeding. The Company would have had its day in court, but under circumstances which made that privilege of doubtful advantage. In a close case such as this, it was not bound either to submit to a supposed illegal exaction, or to incur the hazard of an enormous penalty in case the tax should be sustained.

In *Erskine* v. *Van Arsdale*, 15 Wall., 75, Chief Justice Chase, in delivering the opinion of the court laid down the rule as to recovering taxes as follows:

> "Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them."

This is the general rule in the federal courts. A case very much in point is *Robertson* v. *Frank Bros.*, 132 U. S., 17. In that case the appraisers required an importer to add 50 per cent. and other illegal charges to the amounts returned on certain imports. The importer was told that if not added by him, the amounts would be added by the appraiser, and a penalty of 20 per cent. charged. To avoid the penalty the illegal charges pere paid under protest. It was held that the unlawful payments could be recovered. The court cited *Maxwell* v. *Griswold*, 10 How., 242, 256, and quoted the following language from the decision in that case:

> "This addition and consequent payment of the higher duties were so far from voluntary in him that he accompanied them with remonstrances against being thus coerced to do the act in order to escape a greater evil, and accompanied the

> payment with a protest against the legality of the course pursued towards him. Now, it can hardly be meant in this class of cases that to make a payment involuntary it should be by actual violence or any physical duress. It suffices if the payment is caused on the one part by an illegal demand and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property, except by submitting to the payment."

Of this language Mr. Justice Bradley, who delivered the opinion of the court in *Robertson* v. *Frank Bros.*, said:

> "In that case, it is true, the fact that the importer was not able to get possession of his goods without making the payment complained of was referred to by the court as an *important* circumstance; but it was not stated to be an *indispensable* circumstance. The ultimate fact of which this was an ingredient in the particular case, was the moral duress not justified by law. When such duress is exerted under circumstances sufficient to influence the apprehension and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary."

If this be the test, surely the payment in the case at bar was not voluntary. The moral duress produced by the prospect of a fine of fifty dollars a day is sufficient to influence the apprehension not only of a prudent business man but of a bold one. That the test laid down above is the proper one, is fully supported by another case relied upon by Mr. Justice Bradley—*Swift* v. *U. S.*, 111 U. S., 22, 28.

The tendency of the courts in recent years has been in the direction of the federal rule. It would be unreasonable and a great hardship to allow taxes paid under protest to be recovered back only when there was an immediate duress of property or of the person. A much

stronger case is often made where these technical prerequisites are lacking. And the courts are more and more inclined to a liberal application of the doctrine laid down in *Robertson* v. *Frank Bros.* In *Ratterman* v. *Express Co.*, 49 Ohio St., 608, the defendant in error had recovered back taxes paid under protest in a case similar in principle to the case at bar. The tax was on the gross receipts of the company and was clearly unconstitutional. But the statute provided that if the tax remained unpaid for twenty days, it should be a misdemeanor for any person thereafter to act as agent for the company or to do business with it. There was no question of imminent duress either of person or of goods. The company could have resisted with a valid defense any suit to collect the tax. It could have enjoined any steps to enforce it. Any one charged with a misdemeanor for violating the penal section of the act would have had a perfect defense. And yet, the inevitable and heavy loss which would have followed a refusal to comply with the unconstitutional statute was perfectly apparent. The judgment allowing the recovery was affirmed. The Supreme Court of Ohio proceeded upon the same doctrine as that laid down by the Supreme Court of the United States. The court said:

> "A payment under protest on the ground of illegality of the tax assessed against the express company, to avoid the penalties and disabilities imposed by Section 2843 of the Revised Statutes can not, in our judgment, be regarded as a voluntary payment."

The same principle was laid down in *Baker* v. *Cincinnati*, 11 Ohio St., 534. The plaintiff in error had paid under protest a license tax as a condition precedent to the right to run his theatre. The penalty in case the license was not paid was a fine in any amount up to one hundred ($100.00) dollars for each offense. There was no imprisonment involved, and no summary seizure of property. The court distinctly laid down that the pay-

ment was not voluntary; but no recovery was had because the license tax itself was valid. A similar case is *Baker* v. *Panolee Co.*, 30 Tex., 86, where a license tax to sell liquor was paid under protest, to avoid heavy penalties. The tax here was held invalid, and a recovery allowed on the ground that the party was not bound to run the great risk entailed by refusing to pay the tax. To precisely the same effect is *City of Marshall* v. *Sneidcker*, 25 Tex., 460. The effect of the decisions on this point is summed up in *Galveston Gas Co.* v. *Galveston County*, 54 Tex., 280, as follows:

> "These cases recognize that a payment may be compulsory, although not made to relieve the person or goods from seizure or detention, actual or threatened, if made under circumstances creating a normal pressure of equal influence in perverting the free will—*Galveston County* v. *Gorman*, *supra*. Where made to avoid the danger of a heavy penalty, which, however, could only have been enforced a criminal prosecution, in which the party would have lost his opportunity to set up the illegality of the tax as a defense, the recovery back was allowed; 25 Tex., and 30 Tex., *supra*. On the same principle, we think that the plaintiff here *was not compelled to risk the heavy loss which might have resulted from the sale, although his possession could only have been disturbed by a suit in which he would have had his day in court.* The moral pressure was sufficiently great, the necessity sufficiently immediate or urgent, to remove the payment illegally made under protest from the class of voluntary payments." (Italics ours.)

Cooley on Taxation, (3d Edition) thus states the rule at page 1506:

> "It is sufficient if the circumstances are such as fairly to lead to the conclusion that the waste and expense can be avoided only by payment."

Any rule other than that laid down by these authorities would substantially allow the Legislature to enforce unconstitutional taxation. If one penalty can be imposed for non-payment, so can another. And since there is apparently no limit to legislative discretion in this particular, the payment of an unlawful tax might be made a matter of life and death for a public corporation, or for anyone else, where the tax could not be enforced summarily without suit. No prudent business man would dare take such a risk. So the fact that a quasi-public utility is always entitled to its day in court, instead of a protection, would be a means of legislative oppression.

Ordinarily there should be no doubt that the reasonable rule laid down by the Supreme Court would prevail in Kentucky. For the law in this State with respect to the recovery of money wrongfully collected is more lenient than the doctrine prevalent elsewhere. The general rule is that money paid for taxes or for anything else, under mere mistake of law, and with full knowledge of the facts, can not be recovered back. In this State the rule is otherwise, and a recovery under the circumstances is allowed. Especially is this the case where the parties are not on equal footing, as the fact always is in the matter of taxation. *Louisville* v. *Anderson*, 79 Ky., 334. But in this very case, after laying down liberal doctrine, the court let slip a dictum which is the cause of some difficulty. It states that where a party can plead and make his defense, a payment made under protest will be deemed voluntary. This statement is purely *obiter* because the court was considering only the case of a private citizen, under a tax which could have been enforced summarily. And there can be no doubt that the court in laying down this rule had in mind only the plain case involving no penalty for non-payment. The usual principle was applied in *L. & N. R. R. Co.* v. *Hopkins*, 87 Ky., 605, where the company sued to recover taxes *paid in ignorance of the law*. Relief was denied because there could have been no summary levy,

and the company might have had its day in court. In this case there was no question of protest whatever. It was purely a mistake of law, unconnected with any element of compulsion. The court distinctly says at page 614 that the exception to the general rule operates against railroad companies only. In *L. & N. R. R. Co.* v. *Commonwealth*, 89 Ky., 531 it is again held that railroad companies can not recover money paid for taxes under mistake of law. It is submitted that both these cases, and the Anderson case go, with reference to railroad companies or any other utility, or to any private person, only to this extent: that where any of these parties having a right to a day in court, pays taxes voluntarily under mistake of law, he is not in the same position as a private person who pays a property tax where his property is subject to distraint or sale. The court in the cases cited, nowhere intimates that even a railroad company must exercise its right to a day in court, where failure in its defense would involve more than the payment of the tax resisted.

THE FRANCHISE TAX IS INVALID BECAUSE IT IS SUBSTANTIALLY A TAX ON RECEIPTS FROM INTER-STATE COMMERCE.

The petition sufficiently shows how the amount of this tax is reached. The Board of Valuation and Assessment first takes *the entire net income* of the Bridge Company, and capitalizes it on a basis of six per cent. It then takes 59 per cent. of this sum, because 59 per cent. of the bridge structure lies within Kentucky, and from this amount deducts the value of the tangible property in this State. The result is the value of the franchise. The significant feature of this method is the basis of the calculation, *which is the income of the bridge.* It is now positively settled that this bridge is purely an instrument of inter

state commerce. *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S., 201. But for the income of the bridge, which is produced by the traffic, there would be no franchise tax. So it is entirely different from a tax on the tangible property used in inter-state commerce, for it is taxed regardless of the traffic, and whether there is any traffic at all, or not. On this distinction it has been settled that the *receipts* from this traffic can not be taxed by a state. *Philadelphia, etc., Steamship Co.* v. *Pennsylvania*, 122 U. S., 326; *Ratterman* v. *Telegraph Co.*, 127 U. S., 411. If the income can not be taxed, directly, it is difficult to see how it can be taxed, indirectly, by means of a franchise tax based entirely upon this income.

The decision in *Covington & Cincinnati Bridge Co.* v. *Kentucky*, holds simply that this Bridge Company is engaged exclusively in inter-state commerce, and that, consequently, the Kentucky Statute seeking to regulate its tolls was void. The opinion of the court closes with this suggestive sentence:

> "As was said by Mr. Justice Miller in the Wabash case, it is impossible to see any distinction in its effect upon commerce of either class, between a statute which regulates the charges for transportation and a statute which levies a tax for the benefit of the State upon the same transportation."

This places statutes limiting tolls and statutes levying taxes upon the same basis. In the case of the very bridge with which we are now concerned, the court was holding that the State could not regulate its tolls. It must follow that the State is equally powerless to lay a tax upon its transportation.

The contention that the present franchise tax is invalid is strongly supported by the *Henderson Bridge Co.* v. *Kentucky*, 166 U. S., 150. It is true that there a franchise tax was sustained on that particular bridge, which crosses the Ohio between Kentucky and Indiana. But the

court takes care to declare that the bridge was not engaged in inter-state commerce. "Clearly the tax was not a tax on the inter-state business carried on, over, or by means of the bridge, because the bridge company did not transact such business." The case in no way overrules *Covington & Cincinnati Bridge Co.* v. *Kentucky*, but distinguishes it. In holding that the Henderson Bridge was not engaged in inter-state commerce, the court did so because that question was material. Had the character of its business been of no importance the court would not have considered it. The fair inference to be drawn from the opinion is that if the Bridge Company had been engaged in inter-state commerce the tax would not have stood. The two cases establish the rule that a bridge leased to a railroad company is not an instrument of inter-state commerce, and that a non-railroad bridge, like that involved in this case, is an instrument of inter-state commerce. Upon this distinction rests the decision in the Henderson Bridge case.

A similar case is *Keokuk Bridge Co.* v. *Illinois*, 175 U. S., 626. There a tax was sustained on the capital stock of a company whose bridge extended across the Mississippi river. Of that case it is sufficient to say that the court classed the bridge involved with the Henderson Bridge. The court cited the Henderson case and quoted the language distinguishing its business from that of the Covington bridge.

The distinction between an ordinary property tax and a tax on traffic is well illustrated in the case of the State Freight Tax, 15 Wall., 232. In that case a Statute of Pennsylvania sought to tax railroads on all freight loaded and unloaded in the State. It was held by the court, speaking through Mr. Justice Strong, that the act was void under the Commerce Clause, because such a tax must inevitably burden the traffic of the carriers affected by it. This traffic would in some instances be interstate. The

fact that the act would also affect commerce wholly internal did not validate it. The court said:

> "It has repeatedly been held that the constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid."

The subject was clearly the freight carried, *because* it was carried. This case illustrates the settled test, which is whether the tax falls upon property *irrespective of its use*, or upon the *traffic* as such. It is now well settled that a tax on the receipts from this traffic is a tax on the traffic itself, and so void. It was held otherwise by a divided court in the case of the State tax on Railway Gross Receipts, 15 Wall., 284, but that case has long ceased to be the law. It was squarely overruled in *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S., 326. This was an action by the State of Pennsylvania to recover taxes under an act laying a tax on the gross receipts of ship companies incorporated under its laws. The plea set up the defense that no part of the company's receipts came from commerce wholly within the State. It was held by a unanimous court that the act was unconstitutional. The tax was levied directly on the receipts from inter-state and foreign commerce. It was, therefore, a regulation of that commerce. As was said—"Taxing is one of the forms of regulation. It is one of the principal forms." Mr. Justice Bradley, delivering the opinion of the court used the following language:

> "If the State can not tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere form, it is very difficult to see any difference. * * * It would seem rather metaphysical than plain logic for the State officials to say to the company: 'We will not tax you for the transpor-

> tation you perform, but we will tax you for what you get for performing it.'"

This demolishes the distinction drawn betwen the case of the State Freight Tax and case of The State Tax on Railway Gross Receipts. The Gross Receipts case is reviewed and repudiated. The two grounds on which that case was decided are separately considered. The first ground was that the tax should be sustained under the principle laid down in *Brown* v. *Maryland*, 12 Wn., 419—that imported goods might be taxed after the original packages had been broken and the goods had become incorporated in the general mass of property in the State. The analogy was held bad because the imported goods are not followed and singled out for taxation, by reason of their having been imported. If they were, the tax would be as unconstitutional as if imposed on them while in the original packages. On this point the court said:

> "The tax in the present case is laid upon the gross receipts for transportation as such. These receipts are followed and caused to be accounted for by the company dollar for dollar. It is these specific receipts, or the amount thereof (which is the same thing) for which the company is called upon to pay the tax. They are taxed, not because they are money, *but because they were received for transportation.*" (Italics ours.)

THE TAX IS NOT DEFENSIBLE AS A TAX ON THE FRANCHISE TO EXIST, GRANTED BY THE STATE, FOR IT FALLS UPON THE FRANCHISE TO DO BUSINESS, NOT GRANTED BY THE STATE.

The second ground of the Gross Receipts decision was that the tax amounted to a tax on the franchise granted by the State. This ground was held bad for two reasons: first, because the statute included foreign corporations,

not chartered by the State; and, second, because, as said by the court:

> "If intended as a tax on the franchise of doing business, which in this case is the business of transportation in carrying on inter-state and foreign commerce—it would clearly be unconstitutional."

This language touches a distinction drawn in several decisions by the Supreme Court, notably in the Henderson case and the Adams Express case, cited below. There is a difference between a franchise to *exist* and franchise to *do business*. It is intimated that a state may tax even an inter-state commerce corporation for the privilege to exist. For example, this State imposes a certain tax as a condition precedent to the right to become a corporation. This law applies to all corporations and is valid as to all, regardless of their business. It may be that a tax might be levied annually against all corporations for the continued privilege of *existence*. The court, in the language cited above, says that the tax involved could not have been a franchise tax for the right to exist, because the statute in the Gross Receipts case embraced companies incorporated elsewhere. So the only kind of franchise tax it could have been was a tax on the franchise to do business, which no State could enforce.

The language used by the court with reference to the rule laid down in *Brown* v. *Maryland* is strongly in point in this case. The Bridge Company is compelled to account for the receipts on its traffic, dollar for dollar. It is substantially upon this amount that the tax is based—*not because it is so much money owned, but because it was received for the business conducted by the Company, which is exclusively inter-state commerce*. Moreover, the idea that this tax is valid because in the form of a franchise tax, is practically disposed of in the language cited from the opinion of Mr. Justice Bradley, reducing *ad absurdum* the position of the State. Is not the distinction drawn

here as "metaphysical" as that cited, where the Kentucky officials say:

> "We will not tax you for the transportation you perform; we will not even tax you for what you get for performing it—but we will charge you a *franchise* tax based upon what you get for performing it?"

In the Philadelphia Steamship Case the court considered and followed the *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 196. The statute in that case provided that all corporations doing business in Pennsylvania should be taxed on their capital stock. The plaintiff in error was incorporated in New Jersey. Its entire business consisted in ferrying passengers and merchandise across the Delaware river between Camden, N. J., and Philadelphia, Pa. The tax was held by a unanimous court to be unconstitutional. The Supreme Court of Pennsylvania had sustained the statute on two grounds; first, that this was not a case of inter-state commerce; and, second, that the tax was a franchise tax. Both reasons were repudiated by the Supreme Court of the United States. Mr. Justice Field, who delivered the opinion of the court, said:

> "As to the second ground given for the decision below, that the company could not lease its wharf in Philadelphia except by the implied consent of the Legislature of the Commonwealth, and thus is dependent upon the Commonwealth to do its business, and, therefore, can be taxed there, it may be answered that no foreign or inter-state commerce can be carried on with the citizens of a State without the use of a wharf, or other place within its limits on which passengers and freight can be landed and received, and the existence of a power in a state to impose a tax on the capital of all corporations engaged in foreign or inter-state commerce for the use of such places would be inconsistent with, and entirely subversive of the power vested in Congress over such commerce."

And later on:

> "While it is conceded that the property in a state belonging to a foreign corporation engaged in foreign or inter-state commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation *because it is used to carry on that commerce, or upon the transportation of persons or property, etc., is involved and void.*" (Italics ours.)

The act under consideration prescribed substantially a franchise tax. The case involved a foreign corporation, but the court held in so many words that foreign and domestic corporations were on the same footing under the Commerce Clause. Whether a corporation was foreign or not could cut no figure in determining whether the burden of a tax on its franchise fell upon its commerce. Of the Ferry case, the court said in the Steamship case, cited above:

> "It is hardly necessary to add that the tax on the capital stock of the New Jersey Company, in that case, was decided to be unconstitutional because, as the corporation was a foreign one, the tax could only be construed as a tax for the *privilege or franchise of carrying on its business and that business was inter-state commerce.*" (Italics ours.)

And further on:

> "The decision in this case (the Ferry case) and the reasoning on which it is founded, so far as they relate to taxation of inter-state commerce carried on by corporations *apply equally to domestic and foreign corporations* * * *. But their *business* as carriers in foreign or inter-state commerce can not be taxed by the State, under the plea that they are exercising a franchise." (Italics ours.)

Here again we have the distinction between the two kinds of franchise taxes. In the case of a foreign corporation, the tax can not be a tax for the right to *exist*, because the charter has been obtained elsewhere. Nor can it be a tax for the mere right to *enter* the State, because no State can exclude a corporation engaged in inter-state commerce. *Horn Silver Mining Co.* v. *New York*, 143 U. S., 305. But the court held in the two cases last cited that neither a domestic nor a foreign corporation engaged in inter-state commerce could be taxed for the privilege of doing *business*. Now, of which class is the present franchise tax, a tax on the franchise to exist or on the franchise to do business? There can be but one answer. It is clearly a tax on the franchise to do business. Wherein does it differ from the tax held void in the Gloucester Ferry Case? Only in the fact that the present tax is more clearly based upon the traffic of the company concerned. Would there *be* any franchise tax if the Bridge Company simply continued to exist in its corporate capacity, without having any net income? Assuredly not. This tax presupposes business, is estimated upon the income derived from the business, and would cease entirely if the business ceased. A tax on the franchise to *exist* would, of course, depend only on the retention of the charter.

The case chiefly relied upon by the Court below in sustaining the demurer was *Adams Express Co.* v. *Kentucky*, 166 U. S., 172. This is substantially the same case as *Adams Express Co.* v. *Ohio*, 165 U. S., 194. That case involved an Ohio statute which taxed express companies, not on their tangible property, but on their capital stock. This system increased the amount of taxation many fold. The act was sustained by a majority of the court. Although the Commerce Clause of the Constitution was invoked by the counsel for the Express Company, the court considered that the case turned on the Fourteenth Amendment. The so-called "unit" system adopted by the stat-

ute considered all the property owned by the Company, wherever situated, and based the tax on the relative amount in Ohio. The court held that this did not violate the Fourteenth Amendment by taxing property beyond the jurisdiction. It was held that the tax was only a property tax, and that the method adopted was only a fair way of getting at its real value. In denying a petition for rehearing, the Court emphasized the fact that the tax was not on the privilege of doing business, 166 U. S., 185. Mr. Justice Brewer, delivering the response of the court, said, at page 218:

> "Again and again has this court affirmed the proposition that no State can interfere with inter-state commerce through the imposition of a tax, by whatever name called, which is, in effect, a tax for the privilege, etc."

And later:

> "Now the taxes imposed upon express companies by the statutes of the three states of Ohio, Kentucky and Indiana, are certainly not in terms 'privilege' taxes. They purport to be upon the property of the companies. They are, therefore, not in form at least, subject to the denunciations against privilege taxes, which have so often come from this court. The statutes grant no privilege of doing business, charge nothing for doing such a business, and contemplate only the assessment and levy of taxes upon the property of express companies situated within the respective States. And the only really substantial question is, whether, properly understood and administered, they subject to the taxing power of the State property not within its territorial limits. The burden of the contention of the express companies is that they have within the limits of a State certain tangible property, such as horses, wagons, etc., that that tangible property is their only property within the State; that it must be valued as other like property, and upon such valuation

> alone can taxes be assessed and levied against them."

And the Court proceeds to hold that those enormous aggregations of wealth should not be permitted to escape with a paltry tax on their small tangible property; that their intangible property was their chief asset, and should bear its just burden.

The Express Company has a vast deal of intangible property, such as contracts with railroads, stocks, bonds, etc. Such property is undoubtedly subject to taxation, regardless of the character of its owner. The court said that if any of the property which made up the total assets of the Company was exempt from taxation, or subject to purely local taxation, the fact should be shown (166 U. S., 222). The Company took this hint and applied it to advantage in *Coulter* v. *Weir*, 127 Fed. R., 897. The plaintiff in error here has shown, emphatically, in what respect the subject here sought to be taxed is rendered valuable. It is made valuable by its business, every item of which consists of inter-state commerce. This commerce is exempt from taxation in precisely the same way as the United States bonds which the court suggested might make up a part of the assets of the Express Company.

It is submitted that the principles involved in the Express cases and the case at bar are in no way similar. Only the fact of the intangible nature of the taxes is common to both. But it is not contended that intangible property is untaxable, as such. The plaintiff in error might own millions in stocks or bonds. This is intangible property, but the Company would have to pay the tax on it just like an individual. The fact that the earnings out of which these securities were bought were from inter-state commerce would be immaterial. The fact that a part of the Company's property was in another state would be immaterial, so far as concerns the right to tax according to the proportion in Kentucky. It is believed that

further than this the Adams Express decision does not go. The express companies did not confine themselves to commerce between States. The tax was not based directly on receipts from any commerce, and, conceivably, the tax could have been levied if net receipts had ceased. The Court in its illustrations of the value of intangible property was not considering the Inter-state Commerce Clause. One of the illustrations was the case of the Henderson Bridge, which the Court had just held was not an instrument of inter-state commerce. Another was the valuable feature of a mere intangible debt owed by A. to B. The decision in no way overruled the Gloucester Ferry case. No intimation was made that an intangible property tax would stand where its burden fell ultimately upon commerce between two states.

On both the principle and the facts the Gloucester Ferry case, and not the Adams Express case, should control here. The Ferry Company, like the plaintiff in error, did an exclusively inter-state business. And the tax in the present case falls more directly upon the commerce itself, than in the Ferry case.

It has been argued that the proper way to ascertain the value of property is by its income. The case of real estate has been cited, whose value bears a direct relation to the rents it yields. Therefore, it is urged, the proper way to tax the franchise of the Bridge Company is on the basis of its income. The analogy might be good if there were not a Constitution involved. Of course, the franchise is valuable to the company. If the bridge spanned the Licking River, it could be taxed on the basis of its receipts. But over the particular subject-matter involved in this suit the states surrendered their control, absolutely and finally, by means of the Commerce Clause of the Constitution. It may be that revenue from this source would be enormously valuable. But still the fact remains that this source has been surrendered. It was surrendered just as the right to charge tonnage duties, import duties and ex-

port duties was surrendered. No doubt the tonnage of a ship is a fair index to its earning power, and, consequently, to its value. But although a ship can be taxed as a piece of property, it can not be taxed on the basis of its tonnage. State Tonnage Tax Cases, 12 Wall., 201. So although a bridge be made valuable because of its commerce between two states, it can not be taxed on the basis of that commerce. It is beside the point to talk of values. The objection goes to the whole of the tax because it encroaches upon a subject-matter over which the state has no control.

There are several cases which emphasize the principle that it is not the technical form of a tax but the substance which determines the question of its validity. In *Postal Telegraph Cable Co.* v. *Adams*, 155 N. S., 686, a State statute was before the court which imposed a "privilege" tax on telegraph companies. The tax was graduated according to the amount and value of the property, measured in miles. It was in lieu of all other taxes and less than a *ad valorem* tax would have been. The act was held constitutional. The ground of the decision was that the tax was substantially a tax on property. The "privilege" of doing an inter-state business was not really taxed at all, and the mere title of the act could not be decisive one way or the other. As the court said:

> "The substance and not the shadow determines the validity of the exercise of the right."

Similar in principle is *Mass.* v. *Telegraph Co.*, 141 U. S., 40. The cases establish that the real nature of a tax, and the subject upon which the burden actually falls are decisive.

THE TAX IS UNCONSTITUTIONAL BECAUSE IT IS SUBSTANTIALLY A PRIVILEGE TAX.

That a license or privilege tax can not be exacted for carrying on an inter-state or foreign business is now firmly established by a long line of decisions. *Brown* v. *Maryland,* 12 Wheaton, 419; *Leloup* v. *Port of Mobile,* 127 U. S., 640; *Welton* v. *Missouri,* 91 U. S., 275; *Robbins* v. *Shelby County Taxing District,* 120 U. S., 489; *Crutcher* v. *Kentucky,* 147 U. S., 47; *Brennan* v. *Titusville,* 153 U. S., 289. Now, what is the difference between a license tax and a franchise tax? What is a franchise? It is in its very essence a privilege. It is a special privilege to do a thing which could not be done but for that privilege. No ordinary person can establish a public highway, a public ferry or a railroad and charge tolls for its use, without special authority. This is a franchise. So is the right to exist as a body corporate. This right to exist, though a privilege, can be taxed, for it is a thing granted by the State. But the privilege of conducting transportation in interstate commerce is not derived from the State, and this the State can not tax.

Ordinary occupations are taxable just as ordinary franchises. Many of them are taxed in the States to-day. In times of emergency all of them are taxed. Peddlers are regularly taxed on their business. But if their business consists of inter-state commerce they can not be taxed. *Welton* v. *Missouri, supra.* There is no difference in principle, whether it be a license involved, or a franchise. Neither can be taxed if the burden falls upon a subject that is exempt from State control. It makes no difference that the State has granted one privilege; it can not tax another. The States have control of ferry franchises even on navigable rivers and on rivers between states. This results from the fact that a ferry right is a right to land on a certain bank. But in this very case of ferries, Mr.

Justice Field pointed out in the Gloucester case, that this control over the franchise gave the State no right to burden the inter-state commerce carried on by means of such ferries.

In conclusion, it may be said that exact point involved is almost an open question. But the principle involved is clear. In the present case, the franchise tax is levied in addition to the tangible property tax. It can be nothing but a burden on the business of the Company. If not a direct burden on the business, then what is it? It depends absolutely on the business. It is an elastic tax, which rises and falls as the business increases and decreases. It would not exist without the business, and it would die to-morrow if the business died. And yet it is said that the tax is not a burden on the traffic. There is no substantial difference between this tax and a tax on the number of passengers crossing the bridge, or the amount of merchandise transported annually.

It is, therefore, respectfully submitted that the judgment below should be reversed.

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Attorneys for Plaintiff in Error.

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No. 37.

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Supreme Court of the United States

COVINGTON & CINCINNATI BRIDGE CO., Plaintiff in Error

vs.

S. W. HAGER, AUDITOR OF PUBLIC ACCOUNTS OF THE COMMONWEALTH OF KENTUCKY, Defendant in Error

Brief for Defendant in Error.

N. B. HAYS, Att'y Gen'l of Ky.,
For Defendant in Error.

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Of Counsel.

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BRIEF FOR DEFENDANT IN ERROR.

May it please the Court:

The plaintiff in error brought this action in the circuit court for a mandamus against the defendant in error, the Auditor of Public Accounts for the Commonwealth of Kentucky, by which it is sought to compel the defendant in error, as Auditor of Public Accounts, to issue his warrant on the Treasurer for the amount of taxes paid by plaintiff in error, into the State Treasury, which taxes, as is alleged, were not due.

A demurrer was sustained to the petition, and the same was dismissed, and this writ of error sued out in the circuit court.

At the outset, we are met with the question of jurisdiction, both of this Court, in the writ of error, and of the circuit court on the petition. The plaintiff in error is

alleged to be a Kentucky corporation, so there is no diversity of citizenship.

The amount for which mandamus is sought is primarily two thousand three hundred and thirty dollars, but in the alternative, eight hundred and sixty-two dollars and sixty-six cents.

As the pleadings, on demurrer, while admitting as true all pertinent facts well pleaded, are to be construed most strongly against the pleader, there is no showing of the jurisdictional amount. The plaintiff can not abandon its alternative relief asked, so as to claim the highest amount set out which it seeks to recover, and thereby give the Court jurisdiction which it would not have under the claim for a alternative relief. If it could so abandon that relief, it could only be done by amended petition, which was not filed.

But beyond this question, is the relief asked, which is not in the power of the Court to grant. A writ of mandamus can not issue against a State officer, when it is on an original proceeding.

Graham, Auditor of La., v. Norton, 15 Wallace, 427.

Counsel insists that jurisdiction of the circuit court of the United States is acquired in this case, because of the allegation that the tax paid violates the Constitution of the United States, as being a regulation of inter-state commerce.

This would be true, if it was an action at law to recover judgment over two thousand dollars, and after judgment, mandamus might issue to enforce the judgment.

Counsel argues that as the circuit court has power to issue mandamus in aid of its jurisdiction to enforce

jurisdiction once acquired; that having stated a case under the Constitution and laws of the United States, the circuit court thereby acquired jurisdiction of the case, and the writ of mandamus is in aid of that jurisdiction. To state that position is to show its unsoundness.

While the Court below had no jurisdiction, and no power to grant the writ, the opinion and judgment of the Court shows that the trial judge waived that question and decided that if it did have jurisdiction and power to grant the relief asked, the petition was insufficient to entitle plaintiff to any judgment.

Under that judgment, this Court has no jurisdiction of the writ of error. The remedy is to be had in the Circuit Court of Appeals. There is no certificate of the trial court that the petition was dismissed for want of jurisdiction. On the contrary, the opinion shows that the decision was on the merits of the case, waiving the question of jurisdiction.

If we may be called upon to discuss the merits of the claim stated in the petition, we may say that it is sought to recover taxes paid on the franchise (intangible property under the Kentucky Statutes) on the bridge across the Ohio river. It is the same case as the Henderson bridge case, and under the same statute as the Express cases, where they were held taxable, and re-affirmed in Atlantic &c., Tel. Company v. Philadelphia, 190 U. S., 163. This was a tax on property, as was determined in the Henderson bridge case.

The cases are identical; they both span the Ohio river; are independent corporations, and inter-state traffic is carried over them. The only difference that we can imagine, is that the Henderson bridge is a railroad bridge

and the plaintiff in error's bridge is a passenger, both for persons on foot and for vehicles, and for street cars. In each case the bridge is but the road over which interstate traffic is carried.

Such a tax on property is not in violation of the commerce clause of the Constitution of the United States.

We respectfully ask a dismissal of the writ of error, and an affirmance of the judgment in the circuit court, dismissing the petition.

N. B. HAYS, Att'y Gen'l of Ky.
For defendant in error.

JOHN W. RAY,
C. H. MORRIS,
Of Counsel.

Circuit court has no power, or original process, to mandamus a State Auditor.

Graham, Auditor, v. Norton, 15 Wall, 427.

The taxes paid and sought to be recovered back was on a bridge across the Ohio river and was not a tax on interstate commerce.

Henderson Bridge Case, 166 U. S., 150.

Express Co. Cases, 165 U. S., 194.

Atlantic, &c., Tel. Co. v. Philadelphia, 190 U. S., 163.

Supreme Court of the United States.

No. 37.—October Term, 1906.

The Covington and Cincinnati Bridge Company, Plaintiff in Error, *vs.* S. W. Hager, Auditor of Public Accounts of the Commonwealth of Kentucky.	In error to the Circuit Court of the United States for the Eastern District of Kentucky.

[November 5, 1906.]

Mr. Justice Day delivered the opinion of the Court.

In this case an original action in mandamus was begun in the Circuit Court of the United States for the Eastern District of Kentucky. It was brought by the Bridge Company to compel the Auditor of Public Accounts for the State to issue his warrant on the State treasury for the amount of a franchise tax collected under authority of sections 4079 and 4080 of the Kentucky Statutes. The return of the tax was asked upon the ground that it levied a burden on the interstate commerce business of the Bridge Company, pertaining exclusively to commerce between Kentucky and Ohio, and was therefore repugnant to the Federal Constitution.

The Auditor appeared by counsel, and, by general demurrer, raised the question of the sufficiency of the allegations of the petition, and by special demurrer challenged the jurisdiction of the court to entertain the action. The circuit court, passing the question of jurisdiction, held that levying the tax in question did not violate the commerce clause of the Federal Constitution, as it was a tax upon property and not upon the business of the company, sustained the general demurrer and dismissed the petition.

We are of opinion that the court below had no jurisdiction of this action. It has been too frequently decided in this court to require the citation of the cases that the circuit courts of the United States have no jurisdiction in original cases of mandamus, and have only power to issue such writs in aid of their jurisdiction in cases already pending, wherein jurisdiction has been acquired by other means and by other process.

Many of the cases are collected in Fourth Federal Statutes Annotated, 503.

The question was before this court recently in *Knapp v. Lake Shore & Michigan Southern R. R. Co.*, (197 U. S. 536,) an action by the Interstate Commerce Commission, by petition for mandamus in the Circuit Court of the United States for the Northern District of Ohio, against the Lake Shore and Michigan Southern Railroad Company to compel it to file re-

ports required by the act to regulate interstate commerce. It was argued for the Government that while decisions of this court under the Judiciary Act of 1789, (1 Stat. 73,) and the Act of 1875, (18 Stat. 470,) had been construed to confer no original jurisdiction in mandamus in the United States courts, yet the Act of March 3, 1887, (24 Stat. 552,) in view of the modern development in proceedings by mandamus, should be held to confer the jurisdiction upon the circuit courts to entertain original suits in mandamus. The contention was rejected and the prior cases adhered to.

We deem it settled beyond controversy, until Congress shall otherwise provide, that circuit courts of the United States have no power to issue a writ of mandamus in an original action brought for the purpose of securing relief by the writ, and this result is not changed because the relief sought concerns an alleged right secured by the Constitution of the United States.

It follows that the circuit court should have dismissed the case for want of jurisdiction instead of determining it upon the merits. The judgment dismissing the petition is therefore modified so as to show that the case was dismissed for want of jurisdiction, and, as thus modified, the judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court U. S.